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BARRISTER-AT-LAW.

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## ERRATA

Page 7, line 36 should read—
"therefore, the issue calling for corroboration, while the issue to"

Page 68, line 23—for "was organic" read "was no organic".

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DETERMINED BY

# THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

# THE COURT OF APPEAL

IN

# NORTHERN IRELAND

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## REG. v. HODGETT[1]

*Criminal law—Evidence—Corroboration—Evidence of an accomplice.*

The appellant had been convicted of receiving stolen goods. The principal witness for the prosecution was an accomplice who had pleaded guilty to stealing the goods. The accomplice had given evidence of the following facts: (i) that he had sold the stolen goods to the appellant at a certain price; (ii) that on several occasions he had, at the appellant's direction, signed receipt cards for the goods in the fictitious name in which the appellant had made out the cards; (iii) that when the thefts were discovered he had told the appellant, who thereupon stated that he would destroy the records of the transactions.

It was submitted on behalf of the appellant that the corroborative evidence required was evidence relating to such parts of the accomplice's evidence as had been challenged by the defence and which remained a live issue between the Crown and the appellant, and that accordingly evidence which corroborated part of the evidence of the accomplice which was accepted by the defence was not such corroboration as is required by the rule relating to the corroboration of accomplices.

*Held*, by the Court of Criminal Appeal (Lord MacDermott L.C.J., Curran L.J. and McVeigh J.), (i) that independent evidence that the price paid was that stated by the accomplice corroborated the evidence of the accomplice, and that such evidence was material insofar as it showed that the goods were purchased at undervalue;

(ii) that the presence of fictitious names in the accused's handwriting on the receipt cards could be corroborative evidence on which the jury might act, though it did not affirm that part of the accomplice's evidence that it was the accused who told him to sign in a fictitious name;

[1] In the Court of Criminal Appeal before Lord MacDermott L.C.J., Curran L.J. and McVeigh J.: Dec. 7, 1956; Jan. 14, 1957.

(iii) that evidence that certain of the accused's records covering the relevant period had been destroyed could be corroboration of the accomplice's evidence on this matter;

*Held*, further, that there is no authority for restricting the requisite corroboration to the part or parts of the accomplice's evidence which the accused has challenged.

APPEAL against conviction.

The appellant was convicted at the Belfast City Commission on October 22, 1956, of receiving stolen goods, viz. thirty bunches of yarn, and was sentenced to twelve months' imprisonment. An accomplice, who had pleaded guilty to stealing the goods which were the subject of the charge against the appellant, was the principal witness for the prosecution, and in the course of the summing up the trial judge directed the minds of the jury to certain matters which were relied on as affording sufficient corroboration of the accomplice's evidence. This evidence, and the matters relied on as corroboration, appear from the judgment of the court. The appellant appealed against conviction on the ground that the jury had been misdirected.

*Jones Q.C.* for the appellant.

*McCoy Q.C.* for the Crown.

*Cur. adv. vult.*

CURRAN L.J. delivering the judgment of the court: The appellant, Richard Hodgett, was convicted of receiving stolen goods and sentenced to twelve months' imprisonment, the principal witness for the prosecution being one Nathaniel Boyd, who had pleaded guilty to stealing the goods in question, and who was undoubtedly an accomplice. He now appeals against his conviction on various grounds which, apart from those abandoned at the hearing, were all founded on alleged misdirection by the learned trial judge. The summing up contains an adequate warning of the danger of convicting on the uncorroborated evidence of an accomplice, and to this extent it satisfies the rule of practice considered by the Court of Criminal Appeal in England in *R. v. Baskerville*[1], which, since the decision of the House of Lords in *Davies v. Director of Public Prosecutions*[2], must now be regarded as a rule of law. Counsel for the appellant did not challenge the sufficiency of the warning given by the trial judge. His submissions were, in their essence, concerned with what the judge said to the jury respecting the evidence relied upon by the Crown as corroboration.

1 [1916] 2 K.B. 658. 2 [1954] A.C. 378.

The paragraph of the summing up to which exception has been taken comes after the warning already mentioned and a fairly lengthy survey of the evidence given by the prosecution and also by the appellant, who was the only witness called for the defence. On the face of the transcript this paragraph is incompletely reported, and it is not now possible to be certain of the exact phraseology which the judge used at all points. It is regrettable that this court should have to deal with a question of misdirection on a note which is not perfect. In such circumstances it is right that we should read the transcript in the light most favourable for the appellant, and in reaching our conclusions we are satisfied that the appellant has not suffered by the imperfections to which we have referred.

In the passage complained of the judge directed the minds of the jurors to three parts of the evidence which were relied upon as affording sufficient corroboration of the accomplice's testimony. These parts dealt with three features of the case which, for the moment, may be described compendiously, and in the words of the judge, as follows: (a) "The disappearance of the books"; (b) "The price that "was paid for the stuff"; and (c) "The names that were given."

It was contended for the appellant, first of all, that this direction amounted to an instruction to the jury that they should regard each of these three matters as supplying the corroborative element without which it would be dangerous to act upon the story of the accomplice. We are satisfied that this contention is ill-founded and that the learned judge, having directed that each of these three matters was capable in law of supplying the requisite corroboration, left it to the jury to decide for themselves whether in fact such corroboration existed.

The next point taken on behalf of the appellant challenged this last mentioned direction on the ground that of the three matters specified by the judge neither (a) nor (b) nor (c) could be regarded in law as corroboration.

The nature of the corroboration required by the warning which must be given as respects the evidence of an accomplice is described thus by the Court of Criminal Appeal in *Baskerville's* case[1]—"We "hold that evidence in corroboration must be independent testimony "which affects the accused by connecting or tending to connect him "with the crime. In other words, it must be evidence which implicates "him, that is, which confirms in some material particular not only "the evidence that the crime has been committed, but also that the

[1] [1916] 2 K.B. 658, 667.

"prisoner committed it." And later: "It would be in high degree "dangerous to attempt to formulate the kind of evidence which would "be regarded as corroboration, except to say that corroborative "evidence is evidence which shows or tends to show that the story of "the accomplice that the accused committed the crime is true, not "merely that the crime has been committed, but that it was com- "mitted by the accused." It is perhaps well to add that the corroboration required need not confirm the evidence of the accomplice at all material points. This was made clear by the court in *Baskerville's* case[1] where, after affirming the view of Maule J. in *Reg. v. Mullins*[2], that "confirmation does not mean that there should be independent "evidence of that which the accomplice relates, or his testimony would "be unnecessary," it was said[3]: "Indeed, if it were required that "the accomplice should be confirmed in every detail of the crime, "his evidence would not be essential to the case, it would be merely "confirmatory of other and independent testimony."

For reasons which will be apparent later it will now be convenient to consider these principles in relation to the evidence respecting the matters described at (a), (b) and (c) as it stood at the conclusion of the Crown case. We understood counsel for the appellant to agree during the course of the argument that at this stage of the proceedings matters (a) and (c) were capable of being regarded as corroborative; but we think it better to set out our views on this question in relation to all three of these matters.

(*a*) "*The disappearance of the books.*" This description referred to the records kept by the appellant in his business as a waste merchant in connection with cash transactions. These records were of two kinds: (i) cards on which the goods purchased by the appellant, the price paid and the name of the seller were set out; these cards were signed by or on behalf of the seller and seem to have been regarded as cash receipts: so far as the evidence goes each transaction was noted on a separate card. And (ii) a substantial, printed, bound book, costing about £8, which was sometimes referred to as a cash book and into which the card transactions were posted. The only example of this book put in evidence related to the financial year ending September 30, 1956.

The story told by the accomplice, in so far as it bears on this particular matter, may be summarised thus. While a lorry driver employed by a Newtownards firm, he had delivered waste to the appel-

[1] [1916] 2 K.B. 658.
[2] (1848) 3 Cox C.C. 526, 531.
[3] [1916] 2 K.B. at 664.

lant several times a year over a period of years. At the beginning of 1955 he began to steal yarn from the New Northern Spinning and Weaving Co. Ltd. in lots of thirty bundles. He took each lot on his lorry to the appellant's premises and there sold it to the appellant. He deposed to transactions of this sort in January, February and June or July of 1955 and said that the appellant then told him to "ease off "a bit." On each occasion the same procedure was followed. The appellant entered the particulars on a card, including the weight and price, and he, the accomplice, then signed the card and was paid. On November 24, 1955, a further transaction of the same nature took place and this was followed by five other transactions extending over December, 1955, January and February, 1956, and including that of February 15, which was the subject of the indictment. On these six occasions, according to the accomplice, much the same procedure as that already described was followed except that sometimes other names than his own were entered on the cards, and when that happened the accomplice said he signed the other name instead of his own by the direction of the appellant. On February 29, 1956, the accomplice's thefts were discovered and the accomplice swore that on the morning of that day he went to see the appellant at his premises and told him what had happened. The appellant then said, according to the accomplice, that "he would go in and destroy the "cards with my signature on them," and added "Just say you were "at it since Christmas." In cross-examination the accomplice denied that the transaction of November, 1955, was the first he had had with the appellant.

The corroboration relied upon in relation to this part of the case came from the evidence of the police, who, having produced the cash book already referred to and the cards entered by the appellant in respect of the last six transactions, deposed that the appellant's records only went back as far as October, 1955, and that the appellant's explanation of this was that he had destroyed the cards after the end of his financial year, that is, after the end of September, because it was his practice to destroy his cash records in this way. This explanation was given on March 5, 1956, and it is clear from the rest of the evidence that the appellant's business records for the year ending September, 1955, which were destroyed, included not only all cards for that year but the cash book into which those cards had been posted.

The accomplice's evidence as to the appellant's promise to destroy the cards was undoubtedly highly relevant to the Crown case in that

it tended to implicate the accused by showing he was anxious to get rid of records that, on their face, linked him with the accomplice and afforded evidence of a course of dealing between them. It is true that of the six cards found several contain the name of the accomplice as the seller, and it is also true that these cards cover a period which began some weeks before Christmas 1955. Nonetheless, the destruction of all the appellant's cash records, including the cash book, relating to the period up to the beginning of October, 1955, remains, in our view, capable of affording some corroboration of the accomplice's evidence on this important aspect of the case. In all the circumstances this corroborative material cannot be regarded as necessarily neutralised by the explanation which the appellant gave to the police. On the facts, the view to take of that explanation was very much a matter for the jury.

(*b*) "*The price that was paid for the stuff.*" According to the accomplice's testimony he brought to the appellant's premises much the same quantity of yarn on each occasion and received therefor, again on each occasion, much the same price—about £20 or £21. The cards produced by the Crown showed, in the appellant's writing, entries which supported this evidence for each of the six occasions to which the cards relate. The sums paid varied from £20 to £22 10s. 0d. and the rate of payment entered on each card was constant throughout at 60/- per cwt. The accomplice's evidence as to the price received is therefore amply corroborated, but the question remains whether this evidence was, in the circumstances, material. The testimony bearing on price and value was complicated and somewhat technical, but we are satisfied, after a careful examination of the relevant passages, that there was evidence on which the jury could come to the conclusion that what was undoubtedly sold by the accomplice to the appellant was sold at a considerable undervalue. If what came to the appellant's hand in this way could be regarded as yarn, the price paid by him was, on the evidence, about one-seventh of the value: but we have reached our opinion as to the evidence of undervalue on a view more favourable to the appellant, which is certainly open on the evidence taken as a whole, namely, that the yarn when it reached the appellant's premises was tossed and disturbed, and was purchased by him not as yarn but as yarn waste.

(*c*) "*The names that were given.*" Of the six cards already mentioned the seller's name was, in three cases, given as Boyd, and on the cards relating to these transactions the accomplice signs at the bottom "N. Boyd." In the other three cases the names are different. On

the card dated November 24, 1955, the name is Thompson. On that dated December 21, 1955, the name is Watson and on that of February 15, 1956, the name is Brain. These three cards are signed in the names of the sellers and according to the accomplice his was the hand that signed these names. The accomplice said that, apart from his signature, these cards were made out by the appellant who directed him, the accomplice, to sign at the bottom the same name that he, the appellant, had written at the top. The materiality of this evidence is plain. If accepted, it implicated the appellant by showing that he had taken steps to falsify some of the entries in a respect which could make it more difficult to trace the goods concerned to the accomplice. The corroboration here relied upon consisted of the cards and the appellant's admission that he was responsible for the writing upon them apart from the signatures. This corroboration does not affirm that part of the accomplice's story in which he says it was the appellant who told him to sign as he did. But it does affirm that the appellant wrote these fictitious names on the cards and, in the absence of any explanation of this circumstance, we think it supplied corroborative material on which a jury might act if so minded.

We are, therefore, of opinion that at the conclusion of the Crown case the evidence relating to each of the matters (a), (b) and (c) was capable of constituting corroboration sufficient to satisfy the requirements of the warning to be given respecting the evidence of an accomplice.

This leads to a further point made by Mr. Jones on behalf of the appellant which can, we think, be fairly described as the substance of his case. It may be stated as follows. The corroboration which a jury should seek before accepting the evidence of an accomplice must be corroboration in some material particular, and in this respect what is material connotes some issue that remains a live issue between the Crown and the accused after all the evidence has been heard and the case is committed to the jury. Accordingly, the argument proceeded, if the accused has given an explanation of corroborative evidence which accepts and is compatible with that evidence, it is then the explanation that raises the live issue and, therefore, the issue calling for corroboration, which is the issue to which the available corroboration related, falls, so to speak, out of the case. Thus, for example, the live issue in relation to matter (c) became, it was said, not whether the appellant had filled up the cards in the names of Thompson, Watson and Brain, but whether, as he alleged, he had done this because the accomplice had told him that

these were the names of the persons supplying what was being offered for sale. And on that issue, the argument concluded, there was nothing to support the story of the accomplice.

As a general proposition we are of opinion that this submission must be rejected. As already indicated, the purpose of the rule we have been discussing is not to advocate the desirability of finding corroboration of the accomplice's evidence in all its material parts. The test that the warning counsels is less stringent and more practicable than this and is satisfied if the corroboration affirms a part of the accomplice's story, provided that part is such as to implicate the accused in the commission of the offence charged. But the character of this test does not depend on which part of the accomplice's evidence is corroborated so long as its materiality and implicative nature are clear, and we know of no authority for restricting the requisite corroboration to the part or parts of the accomplice's testimony that the accused chooses to put in issue. On the contrary, admissions have for long been held corroborative and it is hard to see how this could be so if the argument under consideration were sound.

It would be unfortunate if the law as to corroboration became confused by technicalities and subtle distinctions and we have no desire to increase the risk of this by attempting to lay down any hard and fast rule for determining what is and what is not material in this field. This must be decided in the light of the facts and circumstances of each case: but it may be added that fine points and straws in the wind should not be used to buttress testimony that is inherently frail, and that what is truly equivocal—as the corroboration canvassed in *R. v. Watson*[1] seems to have been—must be left out of account.

In the present case it was clearly for the jury to accept or reject the appellant's explanations of the corroborative material, such as the destruction of the records and the writing in of the fictitious names. Acceptance, no doubt, would render the corroboration tendered equivocal and useless as a guide to the truth, but rejection would leave it as it stood at the end of the Crown case, as an element to be regarded and acted upon by the jury as they thought proper.

We are satisfied that it was on this basis that the learned judge left the matter to the jury and, accordingly, that there was no misdirection. The appeal, therefore, fails and must be dismissed.

*Appeal dismissed.*

[1] (1913) 8 Cr. App. R. 249.

Solicitor for the appellant: *A. J. Walmsley.*
Solicitor for the Crown: *Chief Crown Solicitor.*

S.M.M.

## McNEILL v. McNEILL[1]

*Administration—Intestacy—Freehold registered land purchased under Land Purchase Acts—Administrators in possession of land for over twenty years—Claim by one of next-of-kin to his distributive share in the land—Claim statute barred—Law of Property Amendment Act*, 1860 (23 & 24 *Vict. c.* 38), *s.* 13—*Supreme Court of Judicature Act (Ireland)*, 1877 (40 & 41 *Vict. c.* 57), *s.* 28(2)—*Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *s.* 86.

Though section 86(1) of the Local Registration of Title (Ireland) Act, 1891, constitutes the personal representatives of a deceased owner of freehold registered land subject to Part IV of that Act express trustees for the persons beneficially entitled thereto, subsection (2) of that section secures to such personal representatives all the "powers, rights, duties and liabilities "of a personal representative in respect of personal estate," and accordingly they can rely on the limitation period of twenty years provided by section 13 of the Law of Property Amendment Act, 1860.

The owner of two freehold farms registered under Part IV of the Local Registration of Title (Ireland) Act, 1891, died in 1903 intestate leaving a widow and five children—a son and four daughters. At first the widow and children lived together on the lands, but the son and three of the daughters quitted the lands on their respective marriages, leaving the widow and the unmarried daughter in occupation. On the death of the widow in 1954 the unmarried daughter, who had continued in occupation of the lands, took out a grant de bonis non to the estate of the intestate as lawful daughter and one of the next-of-kin of the intestate.

In 1955 the son, who had quitted the lands in 1925, began a suit by civil bill for the administration of the estate of the intestate on the footing that he was entitled to his distributive share of the lands comprised in the estate. Neither the widow nor the administratrix de bonis non had at any time given any acknowledgment of title to or interest in the lands to the son, nor was there any other circumstance to prevent time running.

*Held*, that the son's claim was barred by the twenty years' limitation provided by section 13 of the Law of Property Amendment Act, 1860.

*In re Deeney* [1933] N.I. 80 considered and explained.

*Toates v. Toates* [1926] 2 K.B. 30 distinguished.

CASE STATED by Curran J. sitting as Judge of Assize for the County of Londonderry.

Hugh McNeill, hereinafter called "the deceased", was the registered owner of two freehold farms of land which had been purchased under the Land Purchase Acts and registered under Part IV of the Local Registration of Title (Ireland) Act, 1891. The deceased died in 1903 intestate leaving him surviving a widow and five children —one son Andrew McNeill, hereinafter called "the original plaintiff",

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black L.J. and Sheil J.: Jan. 28, 29, Mar. 5, 1957.

and four daughters of whom one was Mary Ann Taggart McNeill, hereinafter called "the respondent". The widow extracted letters of administration to the estate of the deceased but the lands remained registered in the name of the deceased, and the widow and the five children continued to live on the lands. Between 1910 and 1925 the children of the deceased, other than the respondent, quitted the lands on the occasion of their respective marriages, the original plaintiff quitting the lands in the year 1925.

From 1925 to 1954 the widow and the respondent lived together on the lands, and it was agreed by the parties that between those dates the widow was in sole beneficial occupation and possession of the lands. The widow died in 1954 and by her will, after making one small pecuniary legacy, she left the residue of her property to the respondent. After the death of the widow the respondent took out letters of administration de bonis non to the estate of the deceased and continued in possession of the lands.

The present proceedings were begun in 1955 by the original plaintiff by way of civil bill for the administration of the estate of the deceased. At the hearing of the civil bill the Recorder of Londonderry made an order for the administration of the estate of the deceased on the basis that the original plaintiff remained entitled to his distributive share in the lands. Thereafter the original plaintiff died and his son Robert McNeill, hereinafter called "the appellant," took out letters of administration to his father's estate, and the proceedings were revived in the name of the appellant.

The respondent, being dissatisfied with the decision of the Recorder, appealed to the Judge of Assize. On the hearing of the appeal Curran J. reversed the order of the Recorder and dismissed the suit, but on the application of the appellant he stated this case for the opinion of the Court of Appeal on the following question: "Whether "the claim of the appellant as personal representative of one of the "next-of-kin of the deceased to have the lands administered as form- "ing part of the estate of the deceased is barred by

"1. The Real Property Limitation Acts, 1833 and 1874, and/or "by

"2. Section 13 of the Law of Property Amendment Act, 1860."

On the hearing of the appeal before Curran J. it was agreed between the parties as a fact that neither the respondent nor the widow had at any time given any acknowledgment of title to or right or interest in the estate of the deceased or any part thereof to any of the children or next-of-kin of the deceased, and that if time had or could

run in favour of the respondent or the widow nothing had occurred to stop or prevent time running.

*Nicholson Q.C.* and *O'Donnell* for the appellant. We submit that time did not run in favour of the administratrix, either under the Real Property Limitation Acts or under the Law of Property Amendment Act, 1860. Her possession of the lands was in her capacity as administratrix, and as such she was an express trustee of the lands.

With regard to section 13 of the Act of 1860, it may be material to note that this section was an extension of section 40 of the Real Property Limitation Act, 1833, which dealt with property other than land; it did not operate to extinguish rights, but only to bar remedies. In contrast, section 34 of the 1833 Act, which deals with land, did extinguish rights. Accordingly, it would appear that section 13 of the Act of 1860 should be regarded as barring remedies but not as extinguishing rights.

Section 1 of the Act of 1874 has been canvassed in cases of this kind in favour of a twelve-year limitation period, but under that section the possession relied on must be an adverse possession. We say that possession of an administratrix cannot be adverse: see *Cooper v. Cooper*[1]. Part IV of the Local Registration of Title (Ireland) Act, 1891, constitutes a personal representative an express trustee of registered land, and accordingly section 28(2) of the Judicature Act (Ireland), 1877, applies so as to exclude the operation of any Statute of Limitations: see *Toates v. Toates*[2], a case decided under the provisions of the Land Transfer Act, 1897, section 2 of which is in identical terms to section 86 of the Act of 1891. That case was based on *Cunningham v. Foot*[3], in which Lord Cairns specified the three elements necessary to constitute an express trustee. In this case, as in *Toates v. Toates*[2], those elements are all found. *Toates v. Toates*[2] was followed in *In re Loughlin* [4], and that was a case under the Act of 1891.

[BLACK L.J. That was an application under section 52, and under that section the application is made by a person who would, but for the provisions of the Act, have acquired a title by possession. In an application under section 52 should not the provisions of Part IV dealing with the trusteeship of the personal representative be disregarded as being a portion of the provisions of the Act?]

It would be difficult for a personal representative to claim a title by mere possession under section 52 when the property is vested in

[1] (1874) L.R. 7 H.L. 53.
[2] [1926] 2 K.B. 30.
[3] (1878) 3 App. Cas. 974, 984.
[4] [1942] I.R. 15.

him as personal representative and his possession arises out of his capacity as personal representative.

*In re Deeney*[1] appears to have been concerned with registered land, but the position as to registered land does not seem to have been adverted to. What was decided was that time starts to run under section 13 of the Act of 1860 from the date of the death, and the case is an authority on that point. We say, however, that insofar as the decision affects registered land it was wrong, and that since the point was not considered the court is not bound by the decision in the present case.

[Black L.J. As far as my recollection goes the question of registered land was not discussed by the Court of Appeal in *In re Deeney*[1].

Sheil J. In the case stated Megaw J. refers only to section 13 of the Act of 1860. Was there in fact any registered land involved in the case?[2].]

If there was any registered land, the fact does not seem to be adverted to. The whole of the judgments deal with the point arising out of the case of *In re Johnson*[3].

[Lord MacDermott L.C.J. There was some discussion as to whether the extraction of a grant might be an acknowledgment. Can the oath of an administrator constitute an acknowledgment?]

Not for the purposes of section 13 under which an acknowledgment has to be made to the person entitled to a share in the property; but in another sense there may be said to be an acknowledgment. There is an acknowledgment of the fact that the person is in possession of the assets as administrator, assuming that time has not already run in his favour when the grant is extracted, and thus there is no adverse possession. An administrator could not therefore rely on the Act of 1874.

[Sheil J. Has the personal representative ever made an application under section 52 of the Act of 1891?]

It would seem not. In order so to do he would have to say, but for the Act I would not be an express trustee, and therefore I can run a title. His possession would not, however, be adverse, but *qua* personal representative, and in order to make a claim on his own

1 [1933] N.I. 80.
2 Subsequent enquiry showed that there was no registered land involved in this case: see *post*. p. 20
3 (1884) 29 Ch.D. 964.

behalf he would have to repudiate his possession as representative of the next-of-kin.

Sections 85 and 86 of the Act of 1891 are designed to provide for the devolution of registered land subject to Part IV as though it were personal estate, but for other purposes the land remains realty: see *In re Longworth*[1]. Section 13 confers no right on the administratrix within the meaning of these sections. The "powers, rights, duties and "liabilities" referred to in section 86 refer to the machinery of administration of personal estate, and if it were intended to bring realty within the ambit of section 13 of the 1860 Act such intention would have to be clearly expressed. The words "other matters in "relation to the administration of personal estate" in section 86(2) and "with the same incidents" in section 86(3) are to be construed ejusdem generis with the immediately preceding words in these subsections.

[They also referred to *In re Howlett*[2] and *Reed v. Fenn*[3].]

*Gibson Q.C.* and *Hutton* for the respondent. There are two alternative grounds upon which the respondent might claim to have acquired a possessory title to the lands—under section 13 of the Act of 1860, or under section 1 of the Act of 1874. We say that the former section is the correct basis for the claim. It is submitted that this section is applicable in the case of an administratrix who has been in possession of registered land for more than twenty years, and that the case of *In re Deeney*[4] correctly states the law as to registered land.

It has been emphasised on behalf of the appellant that adverse possession is necessary under section 1 of the Act of 1874, but it is conceded that an administratrix could rely upon section 13 of the Act of 1860 in respect of a chattel real property. A comparison of the two sections, however, shows no ground for distinguishing between them. Mere possession is sufficient under either.

If the property were leasehold the administratrix would have acquired title under section 13 of the Act of 1860: *In re M'Alea*[5], and the question is whether the Act of 1891 alters the position in this connection. It is submitted that it does not. Part IV of the Act relates to what were formerly tenancies from year to year, and although the fee simple is vested in the registered owner, the object of the Act

1 [1910] 1 I.R. 23.
2 [1949] Ch. 767.
3 (1866) 35 L.J. Ch. 464.
4 [1933] N.I. 80.
5 [1923] 1 I.R. 30.

is to preserve the incidents of the former tenancy. Section 86(1) provides that the personal representative is to hold the land as trustee for those beneficially entitled, subject to the powers, rights, duties and liabilities thereinafter mentioned, which in effect means subject to subsections (2) and (3). Subsection (1) then provides that the beneficiaries are to have the same right to require a transfer of the registered land as they have of requiring a transfer of personal estate, and if that right is to be the "same right", then it must last for the same period as it would in the case of personal estate, i.e., for twenty years.

The trusteeship under section 1 is subject to the provisions of subsection (2), under which "all enactments relating to the administra-"tion of personal estate" and "the powers, rights, duties and liabili-"ties of personal representatives" as to personal estate are to apply to registered land. Section 13 of the Act of 1860 is an enactment relating to the administration of personal estate, and it confers a "right" upon personal representatives in respect of personal estate. The Legislature has itself referred to "rights....conferred by a "statute of limitations" in section 8(1) of the Trustee Act, 1888. Thus, we submit, section 13 of the Act of 1860 is applicable to registered land subject to Part IV of the Act of 1891.

We accept the decision in *Toates v. Toates*[2] and that a personal representative is an express trustee of registered land; but we say that his trusteeship is limited to the extent that he enjoys the same rights as a personal representative in respect of personal estate. In *Toates v. Toates*[1] only twelve, and not twenty, years had elapsed, and a claim to a possessory title could not be based on the 1860 Act, but only on the 1874 Act, which cannot be said to be "an en-"actment relating to the administration of personal estate". The decision in *In re Loughlin*[2] was founded entirely on *Toates v. Toates*[2], but the report of the case makes no reference to the statute on which the claim was based. In fact twenty years had elapsed in that case, and therefore we submit that it was wrongly decided.

If the 1860 Act applies, then the 1874 Act is inapplicable, as two statutes of limitation with different periods cannot apply to the same circumstances; but if it be held that the 1860 Act does not apply then we would submit that the respondent could rely on the 1874 Act by virtue of the provisions of section 52 of the 1891 Act. If the only obstacle in the way of the respondent's relying on the 1874 Act is section 86 of the 1891 Act, then, on an application under sec-

[1] [1926] 2 K.B. 30. [2] [1942] I.R. 15.

tion 52 she could ask the court to disregard section 86, for the words "but for the provisions of this Act" in section 52, while they may be primarily directed to section 34, are wide enough to include section 86 also; and if section 86 is to be disregarded, the respondent, it is submitted, would be entitled to rely on the 1874 Act. There is no express authority as to whether a personal representative is entitled to rely on the 1833 Act and the 1874 Act in respect of chattel real property, but a constructive trustee may do so: see *Doyle v. Foley*[1], the case of an executor de son tort.

[LORD MACDERMOTT L.C.J. The respondent in this case made no application under section 52. How can you now rely on it?]

We submit that it assists us, because, by section 86, the personal representative is to hold the land for the persons by law beneficially entitled, and a person who could successfully bring an application under section 52 can be said to be a person by law beneficially entitled.

[They referred also to *Patrick v. Simpson*[2], and *Brennan v. Brennan and Dalton*[3].]

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J.: Robert McNeill, the present plaintiff and appellant, sues as the personal representative of Andrew McNeill, the original plaintiff, who was a son and one of the next of kin of Hugh McNeill (hereinafter called "the deceased") who died intestate on February 28, 1903, leaving him surviving his widow, Elizabeth McNeill, and five children, including the said Andrew McNeill and the defendant and respondent, Mary Ann Taggart McNeill. The deceased was the registered owner of two freehold farms which were registered under the Local Registration of Title (Ireland) Act, 1891. These farms (which I shall refer to as "the 'lands") had been purchased under the Land Purchase Acts and so became subject on registration to Part IV of the Act of 1891. The lands formed part of the deceased's estate and are still registered in his name. His widow obtained a grant of administration to his estate on September 2, 1903. She died on February 2, 1954, and on September 3, 1954, her daughter, the defendant, extracted a grant de bonis non to the estate of the deceased.

The present suit was commenced in January, 1955, by Andrew McNeill as one of the next of kin of his father for the administration of his father's estate. The learned Recorder of Londonderry made an

[1] [1903] 2 I.R. 95.
[2] (1889) 24 Q.B.D. 128.
[3] [1948] Ir. Jur. Rep. 3.

order for the administration of the unadministered estate which consisted of the lands, and it is clear that this relief was granted on the basis that Andrew McNeill was still entitled as one of the next of kin of his father to his distributive share of the lands, which under Part IV of the Act of 1891 devolved as personalty. On appeal to Assizes Curran J. (as he then was) reversed the decree and dismissed the suit, but stated a case for the opinion of this court as to whether the plaintiff's claim in respect of such distributive share was statute barred. Andrew McNeill, the original plaintiff, went to Australia in 1920 but returned to the lands in 1925. In the latter year he married and left the lands, and if time then started to run against him nothing that happened thereafter has stopped it running. The widow remained on the lands till her death and the defendant has lived on them continuously since her father, the deceased, died in 1903.

If the lands had been of chattel tenure, and therefore personal estate, it is, I think, clear that the plaintiff's claim would have been barred long before suit by section 13 of the Law of Property Amendment Act, 1860, the material portion of which reads:

> "....no suit or other proceeding shall be brought to recover the "personal estate, or any share of the personal estate, of any person "dying intestate, possessed by the legal personal representatives "of such intestate, but within twenty years next after a present "right to receive the same shall have accrued to some person cap- "able of giving a discharge for or release of the same, unless in "the meantime some part of such estate or share, or some interest "in respect thereof, shall have been accounted for or paid, or some "acknowledgment of the right thereto shall have been given in "writing, signed by the person accountable for the same, or his "agent, to the person entitled thereto, or his agent; and in such "case no such action or suit shall be brought, but within twenty "years after such accounting, payment, or acknowledgment, or "the last of such accountings, payments, or acknowledgments, if "more than one were made or given."

In *In re Deeney*[1], this court held that the extraction of a grant does not stop time running under this section and, in my opinion, that case and the earlier decision of this court in *In re M'Alea*[2], are authorities which necessarily lead to the conclusion that the claim would be barred by this section were the estate now in question personalty.

[1] [1933] N.I. 80.

[2] [1923] 1 I.R. 30.

But what if, as here, the estate in question is freehold registered land subject to Part IV of the Act of 1891? The plaintiff says that section 86(1) of that Act has the effect of making section 13 of the Act of 1860 inapplicable as respects such land. The defendant, on the other hand, though admitting that the lands are realty and not personalty, says that the effect of section 86 is to assimilate freehold registered land and chattels real in such a manner and to such an extent that the lands are as much subject to section 13 of the Act of 1860 as if they had been of chattel tenure. That is stating the rival contentions very broadly. To consider them in more detail I must refer, first of all, to the text of section 86 and, then, to the authorities cited by the parties.

The relevant parts of section 86 are as follows:

"86.—(1) Subject to the powers, rights, duties, and liabilities "hereinafter mentioned, the personal representatives of a de- "ceased person shall hold such land as trustees for the persons by "law beneficially entitled thereto, and those persons shall, subject "to the provisions of this Act, have the same power of requiring "a transfer thereof as they have of requiring a transfer of personal "estate.

"(2) All enactments and rules of law relating to the effect of "probate or letters of administration as respects chattels real, and "as respects the dealing with chattels real before probate or "administration, and as respects the payment of costs of adminis- "tration and other matters in relation to the administration of per- "sonal estate, and the powers, rights, duties, and liabilities of "personal representatives in respect of personal estate, shall apply "to such land so far as the same are applicable, as if the land were "a chattel real vesting in them or him, save that it shall not be "lawful for some or one only of several joint personal representa- "tives, without the authority of the court, to sell or transfer such "lands."

For the plaintiff it was submitted (i) that subsection (1) of this section made the personal representative of the deceased an express trustee for the next of kin; (ii) that this brought into operation section 28(2) of the Judicature Act (Ireland), 1877, which says that "No claim of a cestui que trust against his trustee for any property "held on an express trust....shall be held to be barred by any "Statute of Limitations"; and (iii) that in consequence the plaintiff's claim could not be defeated by the Act of 1860 or any other statute of limitation.

I think it must be accepted that a personal representative who is made a trustee under section 86(1) becomes an express trustee: see *Cunningham v. Foot*[1], per Lord Cairns L.C.; and *Toates v. Toates*[2]. But, according to the argument advanced on behalf of the defendant, this has not the effect of bringing section 28(2) of the Act of 1877 into operation so as to prevent section 13 of the Act of 1860 from applying. What section 86(1) does in this regard is, it was said, controlled by its opening words "Subject to the powers, rights, "duties, and liabilities hereinafter mentioned....", and one of the powers or rights thus preserved, the argument proceeded, was the power or right of a personal representative to rely upon section 13 of the Act of 1860, such power or right being "hereinafter mentioned" because of the provision of section 86(2) that "....the powers, "rights, duties, and liabilities of personal representatives in respect "of personal estate, shall apply to such land" [i.e., land subject to Part IV of the Act of 1891] "so far as the same are applicable, as if "the land were a chattel real...."

Now there can be no doubt that section 13 of the Act of 1860 is pleadable and was meant to be pleadable by personal representatives as such, and resort to the section could, in my opinion, be properly described, without any straining of the English language, as the exercise of a power or right on the part of the personal representatives to whom the section applies. The section gives such representatives the means of defeating stale claims, and arms them as, it seems to me, with what may well be a very important power or right. Is there, then, anything in section 86 to keep the words of subsection (2) thereof "powers, rights,... of personal representatives" from including the right to resort to section 13? If the correct view were that the words "shall hold such lands as trustees" had been inserted in section 86(1) for the purpose of bringing section 28(2) of the Act of 1877 into play, there would be an obvious difficulty in construing "powers" and "rights" so as to include the power or right to invoke section 13. But I cannot read section 86(1) as manifesting such an intention on the part of the Legislature. Section 84 of the Act of 1891 provides that freehold registered land, to which Part IV applies, shall vest on death in the personal representative, and section 85 enacts that the beneficial interest in such land shall devolve on intestacy and be divisible as if it were personal estate. These provisions, however, left the duties and powers of personal representatives in respect of freehold registered land somewhat in the air. The land vested in them, but how were they to deal with it and what were

[1] (1878) 3 App. Cas. 974, 984. [2] [1926] 2 K.B. 30.

the rights of those who under this new dispensation became entitled to a share in the freeholds? The primary object of section 86 seems to have been to meet and regulate this situation. The powers, rights, duties, and liabilities of the personal representatives as respects chattels real are to apply to the new form of property, and the relationship between the personal representatives and the beneficiaries is settled by making the former trustees for the latter. If, as I think, that was the main purpose of the section, the consequence that those thereby created trustees were express trustees does not, in my view, suffice to modify the ordinary meaning and scope of the words "powers" and "rights". My conclusion, looking thus far only to the relevant text, accordingly is that in making the personal representatives of a deceased person express trustees of registered land subject to Part IV, section 86, on its true construction, preserves and applies their powers and rights respecting personalty so as to enable them to raise section 13 of the Act of 1860 against a claim to such land.

The next question is whether this conclusion is open upon the authorities. I need not refer in any detail to *In re M'Alea*[1] or *In re Deeney*[2] as neither of these decisions purported to deal with an estate consisting of or including freehold registered land coming under Part IV of the Act of 1891. Some confusion, indeed, appears to have existed respecting *In re Deeney*[2] which, at Assizes (as appears from the case stated) was relied upon by counsel for the present defendant and treated by Curran J. as in point. But this, no doubt, was due to the fact that the decree in that case is stated in the report to have been for the administration of the personal estate and real estate devolving as personalty under the provisions of the Act of 1891. That could have easily induced the assumption that the land concerned was or included freehold registered land subject to Part IV of that Act; but the arguments and the judgments in *In re Deeney*[2] do not touch upon any question concerning land of that nature and in fact, as we ascertained on enquiry, the only land in the estate the subject of that suit was a judicial tenancy which, of course, was personal estate and so was not affected by Part IV of the Act of 1891.

I come next to *Toates v. Toates*[3]. There the plaintiff was the heir of William Toates who died intestate in April, 1913, leaving a widow and two sons, the plaintiff being the elder and the defendant the younger. In October, 1913, the widow took out letters of administration to the estate which included land in the County of Cambridge.

[1] [1923] 1 I.R. 30.
[2] [1933] N.I. 80.
[3] [1926] 2 K.B. 30.

She went into and remained in possession of this land, which must have been realty, until her death in July, 1923. She had devised all her realty to the defendant and he then went into possession of the land. In July, 1925, the plaintiff took out a de bonis non grant to his father's estate and then brought a suit in the county court against the defendant to recover possession. The county court judge held that the widow had not been made an express trustee by the Land Transfer Act, 1897 (section 2(1) of which follows the language of section 86(1) of the Act of 1891), and that the plaintiff's claim was barred by the Real Property Limitation Act, 1874. As already indicated, the court (Warrington and Atkin L.JJ.) held that the effect of section 2(1) of the Land Transfer Act, 1897, was to make the personal representative an express trustee of the realty vested in her by the Act of 1897. That was enough to dispose of the case and the appeal was allowed on the ground that the widow being an express trustee, the Real Property Limitation Act, 1874, could not be pleaded against the plaintiff heir. Nothing like twenty years had elapsed since the death of the deceased in 1913 and section 13 of the Act of 1860 was not relied upon. For this reason the court had not to consider the scope or effect of the words "subject to the powers, "rights, duties, and liabilities hereinafter mentioned" or whether those words enabled the personal representative, although held to be an express trustee, to have recourse to section 13. That being so, I am unable to see in *Toates v. Toates*[1] anything to displace the view I have formed on the text of section 86 alone. Lastly, I would refer to *In re Loughlin*[2]. That was an ex-parte application by Michael Loughlin under section 52 of the Act of 1891 for an order declaring him entitled by long possession to certain freehold registered lands subject to Part IV of that Act. The registered owner, Robert Loughlin, had died intestate in 1917 and letters of administration to his personal estate had been granted in the following year to Margaret Loughlin, his sister. She had died in 1939 having devised her interest in the lands to the applicant, who claimed that in so far as Margaret Loughlin had not acquired the interests of the next-of-kin of the registered owner by agreement she had done so, subject to the provisions of section 52, by "mere adverse possession." Maguire P. (as he then was) refused the application holding, on the reasoning of *Toates v. Toates*[1], that Margaret Loughlin was an express trustee for the next-of-kin of the registered owner and, accordingly, that her possession could not be relied upon by the applicant. There is no reference in the judgment, or in the argument as reported, to the

[1] [1926] 2 K.B. 30. [2] [1942] I.R. 15.

particular statute on which the possessory claim of the applicant was founded, and the point with which this court has now to deal, namely, whether or not the effect of section 86 of the Act of 1891 is to enable personal representatives to plead section 13 of the Act of 1860 as respects freehold registered land subject to Part IV, was not debated at all. In these circumstances I do not think *In re Loughlin*[1] casts any light upon the question we have now before us.

The position, therefore, is that I am unable to find anything in the authorities to modify the conclusion I have reached on the text, namely, that section 13 of the Act of 1860 applies to freehold registered land subject to Part IV of the Act of 1891 as it does to chattels real. I may add that I can see nothing in the Act of 1891 to suggest any conflict between this conclusion and the policy of the Legislature. On the contrary, it seems to me that one would have to search long before finding some ground for distinguishing between chattels real and freehold registered land in this connection. In this country, with its many small holdings, its numerous intestacies and the difficulties, economic and otherwise, of subdivision, the twenty years' limitation period has had much to commend it; and the advent of land purchase and registration subject to Part IV of the Act of 1891 have done little that I can discern to change the position in this respect. The relevant family habits of the agricultural community remain much as they were. As the children grow up and get settled elsewhere they are generally content to let the farm go to those who work it or have to subsist upon it.

I would therefore answer the question submitted as follows: "The "claim of the appellant is barred by section 13 of the Law of Pro- "perty Amendment Act, 1860." The decision of Curran J. dismissing the suit will, accordingly, stand affirmed.

BLACK L.J.: I am in entire agreement with the judgment just delivered by the Lord Chief Justice, and I find very little which I can usefully add.

The broad intention of Part IV of the Local Registration of Title (Ireland) Act, 1891, was to assimilate the devolution of freehold registered land which had been purchased by tenants under the provisions of the Irish Land Purchase Acts, and also the administration of such property upon the death of a registered owner, to the devolution and administration of chattel real property.

This was, of course, quite a natural design. Not only was it a great step towards what had long been felt to be the desirable object

[1] [1942] I.R. 15.

of providing that all types of property should devolve on the owner's death in the same way and should, in the event of his intestacy, be distributed among the same persons, but inasmuch as nearly all the property bought out by tenants under the Land Purchase Acts had been held by them under some type of chattel tenure, the provisions of Part IV of the Act secured that the freehold interest vested in the purchasing tenants should devolve in exactly the same way as their former chattel interests in the property.

Section 84 of the Act of 1891 directs that freehold registered land which has been bought out under the Land Purchase Acts shall upon the death of the registered owner devolve to and become vested in his personal representatives as if it were a chattel real. And by section 85 it is enacted that on the death of a person intestate as to any such land the beneficial interest therein shall devolve upon and, subject to the provisions of the Act, be divisible among the same persons as if it were personal estate as to which he had died intestate. Then by section 86(1) it is provided that "subject to the powers, rights, duties, and liabilities hereinafter "mentioned" the personal representatives of a deceased person shall hold such land as trustees for the persons by law beneficially entitled thereto. For the purposes of the present case the important words in this subsection are "subject to the powers, rights, duties, and "liabilities hereinafter mentioned." This phrase looks forward to the next subsection—section 86(2)—which enacts (inter alia) that the powers, rights, duties and liabilities of personal representatives in respect of personal estate shall apply to such land, so far as they are applicable, as if the land were a chattel real vesting in them or him. So upon the death intestate of the registered owner of freehold registered land which has been bought out under the Land Purchase Acts the land is to vest in his administrator or administratrix and to be divisible among the same persons as if it is personal estate, and the administrator or administratrix is to hold the land as trustee for the persons at law beneficially entitled thereto but subject to the powers, rights, duties and liabilities of the administrator or administratrix in respect of personal estate as if the land were chattel real property.

Now it is established by the two decisions of this court to which my Lord has referred—*In re M'Alea*[1], and *In re Deeney*[2]—that an administrator or administratrix is entitled to rely on the provisions of section 13 of the Law of Property Amendment Act,

[1] [1923] 1 I.R. 30. [2] [1933] N.I. 80.

1860, as a defence to a claim to a share of the intestate's chattel real property put forward by one of the next of kin who has been out of possession for more than twenty years. I see no reason why this power or right of the personal representative to rely upon section 13 in answer to a claim by one of the next-of-kin after the expiry of the period mentioned in the section is not a power or right subject to which the land is to be held for the persons beneficially entitled under the provisions of section 86 of the Act of 1891. In default of any indication to the contrary, words and phrases in Acts of Parliament are to be given their ordinary meaning, and there can be little doubt that in ordinary parlance the power to plead and rely upon the provisions of Section 13 of the Act of 1860 would readily and naturally be spoken of as a power or right of an administrator or administratrix. And, indeed, the Legislature itself has recognised that the word "right" can be an appropriate word to be employed in describing the power or right of a person to rely upon a Statute of Limitations by its use of the phrase "all rights and privileges con- "ferred by a statute of limitation" in section 8(1) of the Trustee Act, 1888.

I would therefore answer the questions submitted by Curran L.J. by declaring that the claim of Robert McNeill as personal representative of Andrew McNeill against the defendant Mary Ann Taggart McNeill as personal representative of Hugh McNeill, deceased, is barred by section 13 of the Law of Property Amendment Act, 1860.

SHEIL J.: I concur.

*Appeal dismissed.*

Solicitors for the appellant: *D. McLaughlin & Sons.*
Solicitors for the respondent: *Macaulay, O'Neill & Martin.*

J.P.

## TRUSTEES OF ST. MACNISSI'S COLLEGE v. COMMISSIONER OF VALUATION[1]

*Valuation—Rating—Voluntary Grammar School—Hereditaments "dedicated to or used for public purposes"—Whether "altogether of a public nature"—Admission of a proportion of "non-qualified" pupils—Poor Relief (Ireland) Act*, 1838 (1 & 2 *Vict. c.* 56), *s.* 63—*Valuation (Ireland) Act*,1852 (15 & 16 *Vict. c.* 63), *ss.* 15, 16—*Valuation (Ireland) Act*, 1854 (17 & 18 *Vict. c.* 8), *s.* 2—*Grammar Schools (Admissions, Scholarships and Special Allowances) Regulations (Northern Ireland)*, 1953 (*S.R. & O.* 1953, *No.* 70) *reg.* 5.

A Group A Voluntary Grammar School, operating under the Education Act (Northern Ireland), 1947, and the regulations made thereunder, and having power to admit a proportion of non-qualified pupils whose education is not "a public purpose," is not "altogether of a public nature" and is therefore not entitled to claim exemption from rating.

Sub-regulation 3 of regulation 5 of the Grammar Schools (Admissions, Scholarships and Special Allowances) Regulations (Northern Ireland), 1953, entitles school authorities to admit non-qualified pupils to the extent of 20 per cent. of the available places even though there are more qualified applicants than the 80 per cent. of the available places.

CASE STATED by the Acting County Court Judge for the County of Antrim, sitting at Ballymena Quarter Sessions.

The Trustees of St. MacNissi's College, a boys' school situated at Garron Tower in the County of Antrim, appealed against the decision of the Commissioner of Valuation refusing to distinguish the college premises as exempt in the valuation list. The College, which had been in operation since 1951, provided a secondary education for boarders and day pupils, the numbers in attendance at the time the appeal was heard being 191 boarders and 85 day pupils. The acting county court judge found that "it is not limited "in the area or religious denomination from which pupils are "drawn" though in fact the pupils are Roman Catholics from every part of Northern Ireland.

Of the capital cost of providing the College 65 per cent. was found by the Ministry of Education under section 106(3) of the Education Act (Northern Ireland), 1947. This grant was made subject to certain terms and conditions which are referred to in an indenture dated September 19, 1951, between several persons named as grantors of the first part, the Roman Catholic Bishop of Down and Connor of the second part, the Ministry of Education of the third part, and the

[1] In the Court of Appeal before Lord MacDermott L.C.J. and Black and Curran L.JJ.: Nov. 19, 20, 21, 26, 27, 28, 1956; Feb. 2, 1957.

Trustees of the College of the fourth part. The Ministry's reason for agreeing to provide 65 per cent. of the cost of the College was to meet a need for the kind of education the College was intended to supply. The deed vested the premises in the Trustees upon trust—
(i) that "the said school so provided shall henceforth be maintained "and carried on as a Group A Voluntary Grammar School upon "the said premises subject to and in accordance with the rules and "regulations of the Ministry applicable thereto and to such further "and other rules and regulations of the Ministry as may from time "to time be made by the Ministry" and
(ii) "that the hereditaments and premises hereby granted shall at all "times hereafter be subject to the liabilities and charges relating "thereto contained in the said Act and regulations under which the "said grant shall be paid by the Ministry."

By a scheme dated August 21, 1951, and framed under section 18(2) of the Act of 1947, the Trustees, with the approval of the Ministry, made provision for the management of the College by a board. This scheme set out the constitution and duties of the board and provided (inter alia) that no extension or improvement of the school buildings should be undertaken unless the plans had been approved by the Ministry, and that the scheme might be amended with the Ministry's approval.

The College received from the Ministry certain recurrent grants in aid, subject to compliance with conditions laid down by the Ministry in regulations made under the Act of 1947. These conditions dealt with most aspects of school organisation, including the appointment and payment of teachers and the numbers of authorised staff. The school must comply with all the requirements imposed on it by or under the Act of 1947; and must be open to inspection by officers of the Ministry. It must not be conducted for private profit and its income must be devoted solely to educational purposes approved by the Ministry. A statement of accounts, certified by a qualified accountant, must be furnished each year to the Ministry and supported by such evidence as may be required. The curriculum, syllabus and timetable is subject to the approval of the Ministry who may prohibit the use of any book of which it does not approve. The scale of fees is subject to the approval of the Ministry.

As a Group A school the College is subject to a number of additional requirements. Its income must not be devoted to what the Ministry considers capital expenditure without the Ministry's consent, and its tuition fees shall be based upon the annual income and

expenditure in connection with the tuition of pupils. Expenditure on tuition may include such salaries and such payment in respect of additional staff as the Ministry may approve and capital expenditure may be met by a fee to be sanctioned by the Ministry and not to exceed £3 per annum save in exceptional circumstances.

Of the places available each school year for the admission of day pupils to the lower division of the secondary department not fewer than 80 per cent. must be reserved for "qualified pupils" as defined in regulation 4 of the Grammar Schools (Admissions, Scholarships and Special Allowances) Regulations (Northern Ireland), 1953 (S.R. & O. 1953, No. 70). Such pupils are entitled to receive scholarships from the local education authorities and in Group A schools the amount of these awards equals the approved tuition fees with certain extras. As a matter of convenience scholarship payments are made direct to the College on behalf of the parents of the qualified pupils by the local education authority. These payments are not subject to any means test and are found entirely out of public moneys. A qualified pupil is not allowed to interrupt his education and cannot change to another school without the permission of the local education authority. The income of the school from all sources must be applied for the educational purposes of the school.

The acting county court judge found as a fact that 85 per cent. of the pupils attending the College were qualified pupils and 15 per cent. non-qualified, and held that the hereditament was altogether of a public nature and used exclusively for public purposes and accordingly ordered the hereditament to be distinguished in the valuation lists as exempt. On the application of the Commissioner he stated this case for the opinion of the Court of Appeal asking whether he was right in law in so holding.

*Harrison Q.C., Lowry Q.C.* and *Rowland* for the Commissioner. The basis of exemption from poor rate is section 63 of the Poor Relief (Ireland) Act, 1838, and its proviso[1], the scope of which is

[1] Poor Relief (Ireland) Act, 1838, s. 63: "....Provided also, that no "Church, Chapel, or other Building "exclusively dedicated to Religious "Worship, or exclusively used for the "Education of the Poor, nor any "Burial Ground or Cemetery, nor "any Infirmary, Hospital, Charity "School, or other Building used ex- "clusively for charitable Purposes, "nor any Building, Land, or Here- "ditament dedicated to or used for "Public Purposes, shall be rateable, "except where any private Profit or "Use shall be directly derived there- "from, in which Case the Person "deriving such Profit or Use shall be "liable to be rated as an Occupier "according to the annual Value of "such Profit or Use."

co-extensive with that of section 2 of the Valuation (Ireland) Act, 1854[1]: *Londonderry Guardians v. Londonderry Bridge Commissioners*[2]: *Commissioner of Valuation v. Sligo Harbour Commissioners*[3]: *Moore v. Boyd*[4]: *McGahan v. Commissioner of Valuation*[5]. Section 63 of the 1838 Act contains the expression "dedicated to or used for public "purposes." Then section 15 of the Valuation (Ireland) Act, 1852, provided for the exemption of "hereditaments of a public nature" and section 16 of that Act[6] provided that "No hereditaments.... "shall be deemed to be of a public nature....unless such heredita- "ments....shall be altogether of a public nature...." Section 16 of the 1852 Act was replaced by section 2 of the Valuation (Ireland) Act, 1854, and those four sections have been the subject of the judgments in the relevant authorities. It is submitted that in order to qualify for exemption under those enactments the premises must be "dedicated to or used for public purposes," i.e., of a public nature, and they must be altogether of such nature.

The principle to be derived from the cases is that no building or land other than that occupied for the services of the State is dedicated to or used for public purposes unless the public generally, without limitation of locality or otherwise, have a right to participate in the benefits of the dedication or user: *Londonderry Guardians v. Londonderry Bridge Commissioners*[2]. The public purpose must be something in which all Her Majesty's subjects are entitled to par-

[1] Valuation (Ireland) Act, 1854, s. 2: "In making out the Lists or Tables "of Valuation mentioned in the said "firstly herein-before mentioned Act "the Commissioner of Valuation "shall distinguish all Hereditaments "and Tenements, or Portions of the "same, of a public Nature, or used "for charitable Purposes, or for the "Purposes of Science, Literature, "and the Fine Arts, as specified in "an Act of the Sixth and Seventh "Years of Her Majesty, Chapter "Thirty-six; and all such Heredita- "ments or Tenements or Portions of "the same, so distinguished, shall, "so long as they shall continue to be "of a public Nature, and occupied "for the public Service, or used for "the Purposes aforesaid, be deemed "exempt from all Assessment for the "Relief of the destitute Poor in "*Ireland* and for Grand Jury and "County Rates...

[2] (1868) I.R. 2 C.L. 577, 586.

[3] [1899] 2 I.R. 214, 224.

[4] [1911] 2 I.R. 579, 585.

[5] [1934] I.R. 736, 751.

[6] Valuation (Ireland) Act, 1852, s. 16: "For the Purposes of such Valuation, "no Hereditaments or Tenements, or "Portions of the same, shall be "deemed to be of a public Nature, "or used for such charitable, scienti- "fic, or other Purposes as herein- "before specified, within the Mean- "ing of this Act, unless such Here- "ditaments or Tenements, or Por- "tions of the same respectively, shall "be altogether of a public Nature, "or used exclusively for such charit- "able, scientific, or other Purposes "aforesaid: ...."

ticipate: *Limerick Corporation v. Commissioner of Valuation*[1]; *Belfast Harbour Commissioners v. Commissioner of Valuation*[2]; *Commissioner of Valuation v. Sligo Harbour Commissioners*[3]. In *Cork Corporation v. Commissioner of Valuation*[4] the Court of Appeal reversed the decision of the King's Bench Division in which Palles C.B. had said that property in which each member of a limited and defined class of the public has an interest is entitled to exemption and had held that public baths were entitled to be exempted from rates.

The thing, however, which none of the cases decide is how the interest of the public is to be delimited. In *Tyrone County Council v. Commissioner of Valuation*[5] it was held that a quarry owned by the County Council on behalf of the ratepayers of the county was not used for public purposes, and in *Kerry County Council v. Commissioner of Valuation*[6]—a case of persuasive authority—the County Council offices were held not to be exempt. In *Guardians of Waterford Union v. Barton*[7] a school was held not to be altogether of a public nature having regard to the admission of certain fee-paying pupils. On the other hand in *Pembroke U.D.C. v. Commissioner of Valuation*[8] it was held that the payment of a fee of 2/6 by each pupil did not, in the circumstances, disentitle a technical school to exemption. It was found in that case that the school was open to all comers, without limitation of class, creed or locality, and that the fees could only be used for school purposes. In *University College Cork v. Commissioner of Valuation*[9] the Court of Appeal held that the College premises were exempted as being altogether of a public nature and used for public purposes. This decision was based mainly on the statutory creation of the College and Cherry L.J. expressly stated that he based his decision on the provisions of the Irish Universities Act, 1908, as amounting to a legislative declaration that the revenues of the College were applicable solely to a public purpose. The Lord Chancellor also stressed the statutory creation of the College and the regulation by statute of the disposition of College monies. In *Alexandra College v. Commissioner of Valuation*[10] a secondary school was held not to be used for public purposes.

In *Trinity College Dublin v. Commissioner of Valuation*[11] it was held that the premises of Trinity College were not exempt, and the

1 (1872) I.R. 6 C.L. 420, 432.
2 [1897] 2 I.R. 516, 529.
3 [1899] 2 I.R. 214, 228.
4 [1916] 2 I.R. 77.
5 [1937] N.I. 184.
6 [1934] I.R. 527.
7 [1896] 2 I.R. 538.
8 [1904] 2 I.R. 429.
9 [1912] 2 I.R. 328.
10 [1914] 2 I.R. 447.
11 [1919] 2 I.R. 493, 503.

grounds on which it was distinguished from the *Cork University* case[1] appear in the judgment of Molony C.J.: (a) Trinity College is an independent institution and not subject to government or any other control; (b) no person has a legal right to become a student; and (c) fees when paid do not go entirely for the benefit of the institution. In a recent case in Eire, *St. Patrick's College, Maynooth v. Commissioner of Valuation*[2] a seminary for the education of candidates for the priesthood was held not to be exempt and it would appear from that case that a factor in the decision was that the college is open to one sex only. The judgment of Murnaghan J. in that case says in effect that it is the manner in which the purpose is to be carried into effect which is to be effective in order to obtain exemption from rating.

St. MacNissi's College is only subject to governmental control in so far as the Education Act, 1947, lays down certain requirements for the obtaining of grants. It cannot be said that the whole conduct of the school must be regarded as being governed by the Act or by regulations merely because of the existence of a statutory system of education. To the extent that this school is partly independent it cannot be described as public and therefore the occupation of the hereditament is not altogether of a public nature.

A distinction must be drawn between things which are public purposes and things which are for the public benefit. Public utility is not the test. In order to qualify for exemption there must be something which stamps the premises with a public purpose. That is negatived here by the fact that a certain proportion of non-qualified pupils are catered for, and in regard to whom the school authorities have an unfettered power of selection. In the rating code "public "purposes" undoubtedly has a wider meaning than "governmental "purposes", but that the word "public" has a narrower meaning than the meaning of the word as identified with charity in *Pemsel's* case[3] is clear from the decision in the *Alexandra College* case[4]. In charity law a public purpose may be charitable though it is confined to a locality or class, *Oppenheim v. Tobacco Imperial Trust Co. Ltd.*[5]. In the rating code "for public purposes" is a phrase which must concentrate on the actual user of the hereditament and not on the reasons for using it. It must be used by, or on behalf of, the public.

This school is in no way a creature of statute. There are obvious differences between the position of voluntary grammar schools

[1] [1912] 2 I.R. 328.
[2] (1955) 91 I.L.T.R. 132.
[3] [1891] A.C. 531.
[4] [1914] 2 I.R. 447, 469.
[5] [1951] A.C. 297.

under the Education Act, 1947, and that of voluntary hospitals under the Health Services Act, 1948. The 1947 Act does not vest the schools in a central education authority; nor give the Ministry power to appoint governing bodies. The endowments of schools are not vested in other bodies nor the trusts under which they are held wiped out. There is no provision for the auditing of accounts by a public officer and trustees are not made agents of the central authority. The only substantial change in the position of voluntary grammar schools since the 1947 Act came into operation has been that if they agree to take 80 per cent. of qualified pupils they will be entitled to a grant of 65 per cent. of approved capital expenditure. The mere fact that grants are made and supervision exercised does not make the hereditaments altogether of a public nature. The actual user by 15 per cent. non-qualified pupils destroys the exemption, not because fees are paid by those pupils, but because, with regard to them, the ordinary purposes of a grammar school are being pursued and those are not public.

*McCall Q.C.* and *Phelan* for the respondent College. That the words "public purposes" in the 1838 Act extend beyond mere occupation by the Crown or a department of State for public or national purposes is clear on the authorities from the *Londonderry Bridge* case[1] to *McGahan v. Commissioner of Valuation*[2].

The exemption which is claimed here is founded on the proviso to section 63 of the Poor Relief (Ireland) Act, 1838. The word "exclusively" appears in the first part of the proviso but is omitted in relation to hereditaments "dedicated to or used for public pur- "poses". Section 2 of the Valuation (Ireland) Act, 1954, is the section containing the directions to the Commissioner and it does not stipulate that the hereditaments should be altogether of a public nature or used exclusively for public purposes. Section 16 of the Valuation (Ireland) Act, 1852, does contain such stipulations but it refers to premises exempted under section 15 of the same act and that section has been repealed. Even though section 6 of the 1854 Act provides that the 1852 Act and the 1854 Act are to be construed as one act, it is significant that section 2 of the later Act is in accordance with the proviso to section 63 of the 1838 Act.

It is not essential, in order to qualify for exemption, that this school should be a statutory foundation. The words "dedicated to" might be appropriate to such foundations, but the additional words

[1] (1868) I.R. 2 C.L. 577. [2] [1934] I.R. 736.

"used for" indicate a wider meaning. On a consideration of the authorities, from which it is practically impossible to extract a general principle upon which to found exemption, the question arises whether juvenile education is in the same category as adult education. It has been held that university education can be a public purpose in certain circumstances: *University College Cork v. Commissioner of Valuation*[1]. In that case the statutory foundation was emphasised but it is submitted that the important element is the carrying out of a statutory public purpose. There is no express declaration in the 1947 Education Act that the provision of education is a public purpose, but the whole Act is based on that assumption, and the existence of a public purpose must be implied. In *Down County Council v. Commissioner of Valuation*[2] it was held that the provision of hospital services is a public purpose though the Health Services Act (Northern Ireland), 1948, does not contain any express declaration to that effect. In that case it was held that each hospital is a unit in the whole scheme for the provision of hospital services and by analogy each school for which provision is made in the Education Act must be considered as a unit in the scheme for the promotion of a statutory system of education. The fact that some part of the education provided by the school may not be free does not deprive it of its public character. Throughout the entire Act it is contemplated that grant-aided or voluntary grammar schools should play their part in the general purpose of the Act, which is undoubtedly aimed at achieving a public benefit. The deed dated September 19, 1951, by virtue of which grants are paid to the school, recites that the Ministry of Education was satisfied that there was need for the establishment of the school.

It is impossible to point to any single characteristic common to all the authorities on the question of whether or not premises are used for public purposes or are of a public nature, but three characteristics are to be found in the cases where educational establishments have been held to be exempt. The premises must be open to the public without limitation as to class, creed or locality. The activity carried on on the premises must be non-profit making, that is, there must be no private profit. There must be some degree of external or public control. Each of these requirements are fulfilled in the case of St. MacNissi's College. The fees paid by 15 per cent. of the pupils are fixed by the Ministry and they are not, and cannot be, a source of any profit to the school. On the question of whether the

[1] [1912] 2 I.R. 328.

[2] [1956] N.I. 173.

payment of fees affects the exemption position, the important factor is the ultimate destination of those fees and not their origin.

Different factors have been emphasised in the various cases as grounds for granting or withholding exemption. In *Ministry of Finance v. Commissioner of Valuation*[1] the essential feature was held to be that the accounts of Stranmillis Training College had to be laid before parliament. In that case it was argued for the Commissioner that the College was not public because in fact it was not attended by any of the Roman Catholic section of the community, but this contention was not accepted. In *Vaughan Memorial School v. Ryall*[2], which was an income tax case, it was contended that the school was not public in that it was intended to provide for the education of Roman Catholic pupils only, but it was held that the word "public" was not to be measured by the number of people using the school, nor was it a matter of religion. It was held that it was sufficient that it should be intended for the education of a class of people co-extensive with the extent of the community.

In *Guardians of Waterford Union v. Barton*[3] the basis of the judgments denying exemption was that the total income of the school was not bound by any trust or order to be devoted to the educational purposes of the school. In *Pembroke U.D.C. v. Commissioner of Valuation*[4] the fact that a fee of 2/6 was payable by each pupil was held not to exclude exemption for the reason that the money was applied, and had to be applied, for the benefit of the main public purpose. In that case the Recorder, whose decision was upheld on appeal, extracted two propositions from the authorities—(i) "that "hereditaments may be held for exclusive public purposes within "the meaning of our valuation code, though the operations carried "on are not in fact enjoyed by the whole community, but only by "sections of them, if the general object be for the benefit of all, "and the advantages held out be open to all the community who elect "to take advantage of them, and be not confined to any class, and if "the whole income be devotable to the public purpose or trust, and "not to any alien or collateral purpose; and (ii) that the fact that "portion of the income is raised by fees or charges, on which ground "alone many of the old cases held that the exemption was taken "completely away, does not take away the exemption if the funds "thus raised are all dedicated to the main public purpose."

[1] (1935) 70 I.L.T.R. 114.
[2] (1920) 36 T.L.R. 694.
[3] [1896] 2 I.R. 538.
[4] [1904] 2 I.R. 429.

St. MacNissi's College is subject to a considerable degree of external control by the Ministry. Though in the *Cork University* case[1] and the *Queen's University* case[2] exemption was granted on the ground of statutory foundation, the *Trinity College* case[3] and the *Maynooth* case[4] show that the important factor which distinguished Trinity and Maynooth from Cork and Queen's was the absence of some degree of external control. It is submitted that in the light of the Irish authorities, St. MacNissi's College has all the necessary characteristics of an educational institution being used for public purposes.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J.: The question raised by this appeal is whether the premises at Garron Tower, County Antrim, which are occupied for the purposes of St. MacNissi's College (hereinafter called "the College"), should be distinguished in the valuation lists as premises which are exempt from rating. The Commissioner of Valuation refused so to distinguish the premises, but on appeal to Quarter Sessions by the Trustees of the College, the present respondents, the learned Recorder of Londonderry (acting as County Court Judge and Chairman for County Antrim) reversed this decision, holding that the premises were "altogether of a public nature and "used exclusively for public purposes." From this ruling the Commissioner now appeals by way of case stated.

The basis of exemption claimed by the respondent trustees (hereinafter called "the Trustees") is statutory and is to be found in three enactments which have been canvassed time and again in the courts. Their language is important. [His Lordship read section 63 of the Poor Relief (Ireland) Act, 1838, section 2 of the Valuation (Ireland) Act, 1854, and section 16 of the Valuation (Ireland) Act, 1852. His Lordship then continued:] Two matters have narrowed the issue for determination. The Commissioner did not seek to suggest that, if some parts of the premises were not rateable, others were. No question of division or segregation, therefore, arises and it is agreed that, whatever the conclusion of this court may be, it will affect the premises as a whole. And secondly, the Trustees have refrained throughout from claiming that the premises should be exempt as being used exclusively for charitable purposes. No concession was made on this point, but it was avoided deliberately and we have not been asked to express an opinion upon it. What remains for decision,

[1] [1912] 2 I.R. 328.
[2] (1911) 45 I.L.T. 96.
[3] [1919] 2 I.R. 493.
[4] (1955) 91 I.L.T.R. 132.

accordingly, is whether the premises are "altogether of a public "nature" having regard to the facts and circumstances set out in the case stated. The words I have just quoted are taken from section 16 of the Act of 1852 and the learned Recorder uses them in his finding and goes on to hold, as well, that the premises are "used exclusively "for public purposes." So far as this appeal is concerned I am unable to see any significant difference between these expressions. It is not disputed that at all relevant times the premises have been used in conformity with and, indeed, in the discharge of the obligations, statutory and otherwise, which bind the Trustees as respects the College, and the real question is whether that user has been exclusively or altogether for public purposes. If it has there can, in my view, be no doubt that the premises must also be considered as altogether of a public nature.

[His Lordship then considered the constitution of the College and the circumstances in which it became a Group A Voluntary Grammar School, and continued:] The College has duly filled the 80 per cent. of its places required to be reserved for qualified pupils and the case stated finds that—"At present approximately 85 per "cent. of the pupils are qualified pupils and 15 per cent. are non-"qualified pupils." The position, therefore, is that the premises must be, and in fact are, used to a substantial degree for the secondary education of pupils whom the Ministry, acting pursuant to the Act of 1947 and the regulations made thereunder, deem worthy of such an education at public expense.

That situation marks a comparatively recent development in the educational system of Northern Ireland, but there can be no question that it conforms with the broad policy of the Act of 1947, the nature of which appears fairly clearly from section 4 thereof. This section reads as follows:

> "4. The statutory system of public education shall be organised "in three progressive stages to be known as primary education, "secondary education, and further education; and it shall be the "duty of the local education authority for every area, so far as "their powers extend, to contribute towards the spiritual, moral, "mental and physical development of the community by securing "that efficient education throughout those stages shall be avail-"able to meet the needs of the population of their area."

In this connection reference may also be made to subsection (1) of section 5 which deals with the duties of local education authorities

respecting the first two of these three stages. The subsection is in these terms:

"5.—(1) It shall be the duty of every local education authority "to secure that there shall be available for their area sufficient "schools—

"(a) for providing primary education, that is to say, full-time "education suitable to the requirements of junior pupils; "and

"(b) for providing secondary education, that is to say, full-time "education suitable to the requirements of senior pupils, "other than such full-time education as may be provided for "senior pupils in pursuance of a scheme made under the "provisons of this Act relating to further education;

"and the schools available for an area shall not be deemed to be "sufficient unless they are sufficient in number, character, and "equipment to afford for all pupils opportunities for education "offering such variety of instruction and training as may be "desirable in view of their different ages, abilities and aptitudes, "and of the different periods for which they may be expected to "remain at school, including practical instruction and training "appropriate to their respective needs."

It is clear that the voluntary grammar schools of the Province, including those within and those without Group A, play a large part in implementing the second stage of what section 4 calls "public "education," and that the Act of 1947 envisages this and provides for it. The first of the questions which must now be considered is whether the premises of the College, in so far as they are used to promote this statutory objective, are of a public nature or used for public purposes in the sense in which those expressions are employed in the relevant enactments.

No useful purpose would be served by reviewing all the numerous authorities cited on this issue. They do not purport to lay down any conclusive test of general applicability and are, for the most part, closely related to their particular facts. The actual decisions are not always easy to reconcile, but some general principles emerge and of these the first to call for notice is that settled by the Exchequer Chamber in 1868 in *Londonderry Guardians v. Londonderry Bridge Commissioners*[1]. There, the Londonderry Bridge Commissioners—a body established by the Londonderry Bridge Act, 1859—were held, by a majority of four to three, not to be rateable in respect of

[1] (1868) I.R. 2 C.L. 577.

the tolls and toll-houses of the bridge on the ground that the bridge itself (of which the hereditaments immediately in question were the necessary adjuncts) was dedicated to and used for public purposes. This determined a notable conflict of opinion in favour of the view that the decision of the House of Lords in the *Mersey Docks* case[1] —based as it was on the circumstance that the Crown was not bound by the relevant English statute, the famous 43 Elizabeth I c. 4—did not rule the construction of section 63 of the very different Irish Poor Relief Act of 1838 and, accordingly, that the "public purposes" of that section should not be restricted to cases in which the Crown was, directly or indirectly, in occupation.

The principle thus established was not disputed before us, but counsel for the Commissioner sought to place a gloss upon it by submitting that premises could not be "of a public nature" or "used "for public purposes" unless the use made of them was subject to an extensive measure of governmental control. If such control were necessary to render the respondents exempt from rateability I would be disposed to think that the control of the affairs of the College, which is now exercisable by the Ministry of Education, would be sufficiently extensive for the purpose. I find it difficult, however, to see any sound basis for this contention. It is true that in a number of the cases in which the decision was to exempt, the element of State control was regarded as material and important, But it does not follow and, so far as I am aware, it has never been held that that element is essential to exemption. What is public in nature or user must often involve the interests of the community to a degree that makes State regulation something to be expected, and it may therefore be highly relevant, in determining whether or not a particular activity is "public," to show that provision has been made for its control by the State. That is clear enough, but I think it is hardly less clear that premises may have a public nature or be used for public purposes without any provision for such control. If, for example, Whiteacre is vested in trustees and laid out and maintained as a public park under a binding declaration of trust made by some private benefactor, while Blackacre is laid out and maintained in the same way and for the same purpose by a statutory body acting under the directions of a government department, there seems to be no satisfactory reason for saying that section 63 of the Act of 1838 applies to the latter but not to the former. The argument was also advanced

[1] (1865) 11 H.L. Cas. 443.

that premises of a public nature or used for public purposes postulated a body in occupation which had been constituted by statute or charter for the performance of some public function. As a proposition that also seems to go too far. The occupation by such a body may make exemption easier to attain, but it can scarcely be regarded as a *sine quâ non*.

Another general principle to be derived from the cases is that the expressions under discussion connote a nature or use which confers benefit, or an opportunity of benefit, upon the public at large. Thus, in the *Londonderry Bridge* case[1] O'Hagan J. (as he then was) says after a reference to the wording of section 63: "These terms are "simple and explicit in themselves, and it seems to me difficult to "imagine a case in which their applicability could be more clear "than this, in which a public work is created solely for the public "benefit....and which is to be forever devoted, not to the use of "any district or of any class, but of 'all Her Majesty's subjects' without exception." And later[2] he adds this: "And, finally, on this part "of the case, when we consider the meaning of the general 'public "'purposes' which exempt from rateability under the Irish Poor "Law, we may take into account the character of the specific purposes which are before declared to create such exemption; and "regard those specific and general purposes as *ejusdem generis*. "And, if we do, we shall see that the church, the school, and the "hospital, are all exempted because in their several ways they are "used for the public benefit of the whole community, and not for the "private or exclusive use of any members of it; and when we find a "building or hereditament used in a like manner, though not described under any of the special categories of exemption, we may "safely say that it is a building or hereditament so dedicated and "used, so as to be free from rateability." Then, in *Limerick Corporation v. Commissioner of Valuation*[3]—a case in which the Queen's Bench Division decided that the Limerick gas works were not occupied for a public purpose—we find Fitzgerald J. (who had been of the majority in the *Londonderry Bridge* case[1]) saying: "The *London-*"*derry Bridge* case[1], however, if it is good law, establishes that there "may be a public purpose, and an occupation for the public services, "which has no connection with the service of the Government of the "country, and which exempts the premises from taxation. But even "the *Londonderry Bridge* case[1] shows that the public purpose must "be one in which every member of the community has an interest."

[1] (1868) I.R. 2 C.L. 577, 584.
[2] Ibid. 585.
[3] (1872) I.R. 6 C.L. 420, 432.

In the same case Barry J. says of the conflicting views[1]: "One, and "(as I think) the right one, is that not only must the 'public purposes' "be such as to exclude all private profit, but the advantages conferred "must be for the benefit of the public at large." That was in 1872. In 1897 the subject again came before the Queen's Bench Division in *Belfast Harbour Commissioners v. Commissioner of Valuation*[2], when it was held, applying the *Londonderry Bridge* case[3], that the property of the Belfast Harbour Commissioners was dedicated to or used for public purposes. In the course of his judgment Gibson J. says[4] after a reference to the *Londonderry Bridge* case[3]: "That case, "explained and followed in the *Limerick* case[5], decides two points— "First, that public purposes extend beyond governmental purposes, "within which exemption in England and Scotland is confined; "second, that such purposes mean purposes in which all members of "the community are interested, and not purposes for the benefit of "individuals, a class, or a locality." In *Commissioner of Valuation v. Sligo Harbour Commissioners*[6], the Court of Appeal affirmed the decision of the Queen's Bench Division that the property of the Sligo Harbour Commissioners was dedicated to or used for public purposes. On the point now under discussion FitzGibbon L.J. says: "The original Act of 1838 indicates the meaning of public purposes, "by contrasting the exempted premises from those, 'where any "'*private profit or use* is directly derived therefrom,' in which case "the person deriving such profit or use is made liable to be rated as "an occupier according to the annual value of such profit or use. I "cannot hold that any private profit or use is derived by the Com- "missioners from the Sligo Harbour." I would also refer to a passage in the judgment of Holmes L.J. where, speaking about the *Londonderry Bridge* case[3], he says[7]: "The true ground of the judgment in "that case was that a bridge, open as of right to every member of "the public, on payment of a toll, which toll could only be used for "the benefit of the public in connection with the bridge itself, and "could never be the source of private profit, was dedicated to, or "used for, public purposes." The same question came again before the Court of Appeal in *University College, Cork v. Commissioner of Valuation*[8], where it was held, affirming the King's Bench Division, that the premises of University College, Cork, were exempt from rating as being altogether of a public nature and used for public

1 (1872) I.R. 6 C.L. at 435.
2 [1897] 2 I.R. 516.
3 (1868) I.R. 2 C.L. 577.
4 [1897] 2 I.R. at 529.
5 (1872) I.R. 6 C.L. 420.
6 [1899] 2 I.R. 214, 223.
7 [1899] 2 I.R. at 228.
8 [1912] 2 I.R. 328, 331.

purposes. In the course of his judgment the Lord Chancellor says: "It is difficult to entertain a doubt that the property in the case "is altogether of a public nature, and is occupied for the public "service, or, in the language of section 63 of the Act of 1838, that "it is dedicated to or used for public purposes." He then refers to the Irish Universities Act, 1908, under which were founded the Queen's University of Belfast and the National University with its seat in Dublin and having, as one of its constituent colleges, University College, Cork, and adds: "That was an Act in which "every inhabitant of Ireland was and is interested, and the advan- "tages bestowed by it are not confined to a single class or district, "but affect the whole population." Then, later in the judgment[1], comes a passage which seems to me of special importance in this appeal. It is as follows: "The University College is open to all "classes of people without distinction of rank, creed, or sex, and "without limitation of locality from which students may come. To "suggest that in these circumstances it is not open to the public "generally, because it is not possible for all persons to comply with "the requirements of the College for the matriculation, and attend- "ance at the lectures, either by inability to pay the requisite fees or "to pass the necessary entrance examination, is, in my opinion, to "disregard the general experience, and any other course would be "against the nature of things in the case of great institutions like the "new Universities, with their Colleges, established to advance and "disseminate knowledge and to promote higher education amongst "all classes of the people, capable, according to the ordinary con- "ditions, of receiving it. The whole country is interested in the work "of these Universities and Colleges, and though there will be, and "necessarily, a limitation in the number of persons who can avail "themselves of their advantages, none the less will the general benefit "resulting from them extend to all sections of the people." Holmes L.J. also deals with this aspect of the matter. He says[2]—"The only "argument of the appellant against holding the College premises "exempt on the ground of their being of a public nature is that a "very limited portion of the public can make use of them. Although, "theoretically, the College is open to all ranks and conditions of "men, its students are necessarily confined to persons able to pay "fees, and preparing for positions and professions which compara- "tively few can reach. But if premises of a public nature in these "Acts include premises other than those occupied for the service of "the Crown or the State, it would certainly be consistent with those

[1] [1912] 2 I.R. at 335.

[2] [1912] 2 I.R. at 344.

"words as employed in ordinary language to apply them to premises "by which only portion of the public is benefited." The last authority on the meaning of the word "public" in the relevant enactments to which I wish to refer is *Cork Corporation v. Commissioner of Valuation*[1]. There, the Court of Appeal reversing the decision of the King's Bench Division held that a concert hall and swimming baths erected by the Corporation of Cork were not of a public nature or used for public purposes so as to be exempt from poor rate. The case is of importance and very much in point on the subject I am discussing because the King's Bench Division and the Court of Appeal took different views on the scope of this difficult word. In the lower court Palles C.B. sets out the possible interpretations as follows[2]: "Speaking generally, that word may be used, in reference to property in "any of three senses:—1. As that which belongs to the Crown as "the government of the country. 2. As that in which each member of "the public has an interest, as, for instance, a public road; and 3. "As that in which each member of a limited and defined class of the "public has an interest as, e.g., the ratepayers of a particular union, "barony, county, or city." After a review of the statutes and authorities the Chief Baron favoured the third of these meanings, though on the facts, as appears from the concluding part of his judgment, he would have been prepared to apply the second meaning on the ground that the premises in question were not only for the purposes of the ratepayers of the borough of Cork but for the purposes of the public generally. The Court of Appeal found that the general public were not entitled as of right to use the premises and it therefore had to address itself to the question whether the proper meaning of the word "public" was the third of those enumerated by the Chief Baron, the first meaning being regarded as inapplicable in view of the decision in the *Londonderry Bridge* case[3]. The Lord Chancellor, Sir Ignatius O'Brien, states the nature of the right of user of the premises in the following passage[4]: "The important point is that under "the Cork local statutes these premises were erected as part of the "municipal undertaking of the city of Cork, and that no person "outside the municipal area could *as of right* demand the user of the "hall for any purpose. With regard to the inhabitants of the city of "Cork itself, there is of course vested in the Corporation the right "to regulate the user of the hall, but, so far as the general community "of the city of Cork is concerned, the hall could not be withdrawn

1 [1916] 2 I.R. 77.
2 [1916] 2 I.R. at 88.
3 (1868) I.R. 2 C.L. 577.
4 [1916] 2 I.R. at 102.

"from the category of municipal buildings which form part of the "corporate property to be used for the benefit of the community of "the city of Cork. On the other hand, however, it would be perfectly "legitimate to refuse the right of user of the hall to the inhabitants "of the adjoining district. I lay stress on this because it goes to the "root of the view which I take as regards these municipal buildings." Then, towards the end of his judgment, he quotes from that of FitzGibbon L.J. in the *Sligo Harbour* case[1] and adds[2]: "He there "clearly recognises what seems to me the fundamental distinction, "namely, that there must be a right of the general public, as dis- "tinguished from a privilege granted to a limited community, of "enjoying the building or property sought to be exempted. In the "same sense I understand the judgment of Holmes L.J." Cherry L.C.J., after mentioning the *Londonderry Bridge* case[3], says[4]: "To "come within the exemption established by that case, however, not "only must the 'public purposes' be such as to exclude all private "profit, but the advantages conferred must be for the benefit of the "public at large—the whole community." And finally, Molony L.J. dealing with the same case, says[5]: "The real ground of the decision "was that, in order to come within the exemption, each member "of the public must have an interest in the matter."

What, then, is "the public generally" or "the public at large"? We are dealing with land and buildings and it is obvious, if only for physical reasons, that these expressions cannot imply a state of affairs in which every member of the country's population has an identical interest and enjoys identical benefits. The Londonderry bridge only accommodated those who had come to the banks of the Foyle, and, similarly, University College, Cork, only educated those who could pay its fees and had shown themselves to have attained a standard sufficient to justify their admission. No doubt, premises may be used for public purposes without the general public having a right of entry, but in the nature of things it must often be the case that, however widespread the right to benefit may be, those who benefit most will in practice be those who are in the locality of the source of benefit. Further, the character of the benefits conferred may be such that some degree of regulation or selection is necessary if the premises in question are to be used effectually for the purposes to which they have been dedicated. A highway bridge may have to be saved from exceptional loads if it is to serve the general need; a port

1 [1899] 2 I.R. 214.
2 [1916] 2 I.R. at 118.
3 (1868) I.R. 2 C.L. 577.
4 [1916] 2 I.R. at 119.
5 Ibid. at 122.

authority may have to regulate the movements of vessels within its limits if its docks and installations are to be used to the best advantage of visiting shipping; and a University that admits all and sundry may well be unable to discharge its educational functions properly. Of course, if they are taken too far, regulatory and selective processes may, as it were, so reduce the field of benefit that what remains can no longer be said to serve the general public. I do not think it possible to find a universal formula which, in any given case, will determine when this point has been reached. The facts of each instance must be examined and weighed and a conclusion sought which will be compatible with the intendment of the relevant enactments. I do not suggest that the general principles I have derived from the authorities will resolve all the problems of interpretation which those enactments can produce, but they at least lay down that "public" connotes the public at large, and that, so long as the right or interest involved is not restricted to some limited class or section of the community, purposes will not fail to be public merely because individual circumstances or regulatory conditions mean that comparatively few can benefit.

In this connection it is well that I should mention two points which were made in the course of the debate. Counsel for the Commissioner stated that the College was a boys' school and appeared to find in the recent decision of the High Court in Eire in *Trustees of Maynooth College v. Commissioner of Valuation*[1] some support for the proposition that premises dedicated to purposes which benefited but one of the sexes could not be said to be dedicated to the service of the general public. We were supplied with certified copies of the interesting and instructive judgments delivered by Davitt P. and Murnaghan J. in that case and it is true to say that in both of them attention is drawn to the fact that Maynooth College is not open to women. That, however, was but one of a series of circumstances which were marshalled to show the very restricted nature of the class eligible for admission to that College, and I do not think either of these learned judges intended to hold that premises restricted to one sex could never be regarded in law as dedicated to or used for public purposes. I think that would be going much too far. Such a restriction may, in some instances, be a matter to be weighed and taken into account, but, in general, I think it will fall to be regarded either as regulatory, or else as a necessary factor in some activity—such as

[1] (1955) 91 I.L.T.R. 132.

a maternity hospital or an old soldiers' home—which enures for the benefit of the entire community.

The other point, to which I would now refer, was prompted by the fact that, under the Act of 1947, the educational service of Northern Ireland is organised—at any rate as respects its first two stages—on a county basis, with each local education authority's obligations confined, in general, to its own district. This, it was submitted, placed the "public" function of schools like the College in the third of the Chief Baron's categories in *Cork Corporation v. Commissioner of Valuation*[1] and therefore kept it out of the second of those categories and so out of the exempting provisions of the relevant enactments. I think this submission, in so far as it would place the College in the third or "local" category, ignores the whole scheme of the Act of 1947 which is to serve the full educational needs of the public at large by ensuring that every area has a sufficiency of schools, each contributing its quota to a task which by its nature cannot be adequately performed, as conditions exist, otherwise than on a local basis. In *Down County Council v. The Commissioner of Valuation*[2], my brother Curran, who had to deal there with much the same point in relation to two hospitals carried on under the Health Services Act (Northern Ireland), 1948, by the Hospitals Authority, said this: "The provision of health services, "including hospital services, throughout Northern Ireland for all "who require such services is, in my opinion, clearly a public pur- "pose. An adequate hospital service can only be provided by having "hospitals in different parts of the country. Each hospital is merely "a unit in the whole scheme, and contributes its services to the public "purpose. Each hospital is clearly, in my view, used for public pur- "poses." If the educational services rendered by the Group A Voluntary Grammar Schools can be described as a public purpose I think the reasoning of this passage affords a good answer to the point under discussion and marks the distinction which exists between the present case and *Cork Corporation v. Commissioner of Valuation*[1].

But do the Group A Voluntary Grammar Schools perform a public purpose? In my opinion they do. They are harnessed to the discharge of a statutory obligation to provide one of the stages of public education in Northern Ireland; they are bound to accept, without any process of arbitrary selection, a substantial proportion of pupils whom the Ministry has decided are entitled to receive a secondary

[1] [1916] 2 I.R. 77. [2] [1956] N.I. 173, 176.

education; they are paid out of public funds the cost of the education they are obliged to give; they are subject to state inspection and to state control in many matters; and all possibility of any private gain or profit is completely excluded. Regarded in the light of the Act of 1947 and of the principles I have endeavoured to extract from the authorities, these considerations seem to me to justify the view that the College as a Group A school is used for public purposes. It would be more than strange if it were otherwise, for in that event some material difference would have to exist between the public nature of the service offered by that type of secondary education and the public nature of the service offered by a modern University. I am unable to find such a difference and a close study of the *University College, Cork* decision[1] leads me to the conclusion that, on the question of what constitutes "public nature," it cannot be distinguished in principle from the present case.

I now come to the final and decisive question. If, as I would hold, the College is used for public purposes is it altogether so used? I leave out of account the boarding side of the College. On the view I have formed of the case it is unnecessary to explore that aspect of the user; and in any event, the concession precluding segregation as an issue, which I have already noted, makes it impossible to found any final determination of this appeal on grounds that relate to the boarding activities of the College. It seems to me that the question I have just posed must be answered according to the view taken of the education at the College of its non-qualified pupils. If their education is to be considered a public purpose then I would regard the word "altogether" as applicable and would affirm the ruling of the learned Recorder. But if the education of the unqualified pupils is not to be considered a public purpose, it cannot be ignored as a trivial factor, and the result must be that the premises though used for public purposes are not altogether so used and are not, accordingly, entitled to exemption from rating.

On this crucial branch of the case it seems to me that the fact that the cost of the tuition of qualified pupils is borne by public funds is not in itself of any special significance. It is a matter which certainly helps to support the conclusion already reached that the College is used for public purposes, but I do not think it can be said to mark any vital distinction between the education of qualified and unqualified pupils for the purposes of the point with which I am

[1] [1912] 2 I.R. 328.

now dealing. I would hesitate long before concluding that the purpose of Parliament as manifested in the Act of 1947 was achieved, as respects secondary education, by providing merely for the needs of those who had become qualified pupils. I can find nothing in the Act to suggest that the needs of those outside that class are to be ignored, and indeed so far as the Act of 1947 goes it would seem that its general policy might have been carried into effect without the abolition of the means test and the consequent provision of scholarships for all qualified pupils. In my opinion the point of importance on which attention must be focussed at this stage of the enquiry concerns, not the source of the fees payable for tuition but the difference, if any, which may exist between the powers of the College authorities to admit qualified pupils on the one hand and unqualified pupils on the other.

I must now return to regulation 5 of the Grammar Schools (Admission, Scholarships and Special Allowances) Regulations (Northern Ireland), 1953. (S.R. & O. 1953, No. 70). By subregulation (3) of that regulation "No qualified pupil shall be refused ad- "mission to a Group A voluntary school. . . . on other than reason- "able grounds." That recognises that the governing body of any school cannot fairly be compelled to admit a qualified pupil where there is some good reason against his admission, such as—and I do not intend this as more than illustrative—some defect in character or health or other special circumstance which would be prejudicial to the standards of the school or the welfare of its pupils. A reasonable discretion of this kind is obviously desirable in the interests of a sound education. Subregulation (3) then continues with a proviso which is in these terms:

> "Provided, however, that, where the number of qualified pupils "seeking admission to the lower division of the secondary depart- "ment of a Group A voluntary school or county school is greater "than the number of places reserved for such pupils in accordance "with the provisions of paragraph (1) of this Regulation, the "school authorities may select such of the qualified pupils as "appear to them best fitted to profit by the education provided "at the school."

Two views of the meaning of this subregulation were canvassed. One was that it imposes an obligation on Group A schools in relation to qualified pupils who remain unplaced after the 80 per cent. of available places which must be reserved for qualified pupils under subregulation (1) have been filled. On this view, if in a given year

there were, for instance, 100 available places and 100 qualified pupils seeking admission in addition to unqualified candidates, all the qualified pupils would be bound to get in, in the absence of reasonable grounds for rejection, in priority to the unqualified candidates. The other view was that this subregulation applies only to the qualified pupils seeking the 80 per cent. of reserved places, and has no applicability once those reserved places have been filled. In my opinion the latter is the correct view. Read literally the first part of the subregulation would support the other interpretation, but the proviso seems to me to show pretty clearly that the whole subregulation is concerned only with the filling of the 80 per cent. places to be reserved under subregulation (1).

If, as I hold, this is the true construction of subregulation (3) it follows that the College authorities have, to all intents and purposes, an unfettered discretion as respects the selection of entrants once the obligation to reserve the 80 per cent. of available places has been honoured. There is nothing to suggest that this discretion has ever been exercised otherwise than reasonably and prudently; but in my opinion that does not affect the real issue which is whether, as respects available places that are not ear-marked for qualified candidates, the power of the College authorities to select pupils is such as to enable it to be said that, in so far as the premises are used for the education of those thus selected, they are used for a public purpose.

In my opinion this question must be answered adversely to the College. Once the provisions of regulation 5 have been complied with, the choice of those admitted depends entirely, as I understand the position, on the will and pleasure of the College authorities. If they so wish, they can prefer one applicant to another on grounds which need not be stated and which need not even be educational in character. They may, for example, in the years to come show a preference for the sons of old boys or for entrants who have some special personal quality or claim. I do not suggest for a moment that if the College authorities did exercise their powers of selection in some such manner as this they would be doing anything wrong or at variance with their obligations. But where the right to benefit depends not merely on standards and regulations which apply to all, but on the free discretion of the selecting body, I think it is impossible to say that the purpose being served by the education of those selected is public in the sense in which that word must be construed in the relevant enactments. It is one thing to benefit those of the public at

large who by their circumstances and qualities are in a position to take advantage of the benefits offered, and quite another to benefit those whose selection is a matter of personal choice and preferment. The former receive their benefits as of right and because they are eligible members of the general public, while the latter do so as individuals and as members not of the general public but, at most, of a circumscribed and discretionary class.

For these reasons my conclusion is that while the College premises are used for public purposes they are not altogether so used, and, accordingly, are not entitled to be exempted from rating.

I am therefore of opinion that the appeal must be allowed and that the questions submitted at (i) and (ii) should be answered together as follows: "The said hereditaments were not altogether of a public "nature or used exclusively for public purposes and, accordingly, "ought not to be distinguished as exempt from liability to rates."

BLACK L.J.: The question for decision in this case is whether the Commissioner of Valuation in making out his lists or tables of Valuation ought, in pursuance of the provisions of section 2 of the Valuation (Ireland) Amendment Act, 1854, to have distinguished the premises of St. MacNissi's College, a Group A Voluntary Grammar School, as being of a public nature so that the premises should be deemed exempt from assessment to rates.

By section 63 of the Poor Relief (Ireland) Act, 1838—the section which still prescribes the liability to assessment to poor rate in Ireland—it was enacted that no building exclusively used for the education of the poor nor any charity school or other building used exclusively for charitable purposes nor any building land or hereditament dedicated to or used for public purposes should be rateable except where any private profit or use should be directly derived therefrom.

The Valuation (Ireland) Act, 1852, provided for the making of a uniform valuation of lands and tenements in Ireland for the purpose of rating assessments, and this Act, as amended from time to time, still constitutes the basis of the code under which the Commissioner of Valuation is to act in carrying out his duties. Section 15 of this Act which was in terms very similar to those of section 2 of the Act of 1854 was repealed by section 1 of the latter Act, and section 2 of that Act was substituted for it. This section 2 of the Act of 1854 provided that in making out his lists or tables of valuation the Commissioner should distinguish (inter alia) all hereditaments and tenements or

portions of the same of a public nature or used for charitable purposes and that all such hereditaments or tenements or portions of same so distinguished should be deemed exempt from assessment to poor rate so long as they should continue to be of a public nature and occupied for the public service or used for the purposes aforesaid.

It is firmly established by repeated judicial decisions that the words "building land or hereditament dedicated to or used for "public purposes" in section 63 of the Act of 1838, and the words "hereditaments and tenements of a public nature" in section 2 of the Act of 1854 mean the same thing, and that the class of hereditaments described in section 2 of the Act of 1854 as being of a public nature is co-extensive with those described in section 63 of the Act of 1838 as being dedicated to or used for public purposes (*Commissioner of Valuation v. Sligo Harbour Commissioners*[1] per FitzGibbon L.J., and Holmes L.J.; *Moore v. Boyd*[2] per Palles C.B.; *University College, Cork v. Commissioner of Valuation*[3] per Redmond Barry C.).

Section 16 of the Act of 1852 enacted that for the purpose of the Commissioner's valuation no hereditaments or tenements or portions of the same should be deemed to be of a public nature or used for charitable purposes within the meaning of the Act unless such hereditaments or tenements or portions of the same respectively should be altogether of a public nature or used exclusively for such charitable purposes. And section 4 of the Act of 1854 directed that the Acts of 1852 and 1854 should be construed together as one Act. Accordingly a hereditament is not for the purposes of the Poor Relief Act and the Valuation Acts to be distinguished in the valuation lists as being of a public nature and so to be exempt from assessment to Poor Rate unless it is *altogether* of a public nature (per Palles C.B. in *Guardians of Waterford Union v. Barton*[4]).

No contention was sought to be put forward on behalf of the Trustees of the College that its buildings were used for charitable purposes within the meaning of the Acts so as to be exempt from liability to rating on that ground. The only question therefore for decision by this court is whether the College premises are altogether of a public nature.

In England while Crown property or property occupied for the general administration of the country is exempt from rates yet the occupation of property for public purposes other than those of the

1 [1899] 2 I.R. 214, 224, 227.
2 [1911] 2 I.R. 579, 586, 589.
3 [1912] 2 I.R. 328, 330.
4 [1896] 2 I.R. 538, 556.

general administration of the country is rateable: *Mersey Docks v. Cameron*[1]. In Ireland, however, the Court of Exchequer Chamber held in 1868 in *Guardians of Londonderry Union v. Londonderry Bridge Commissioners*[2], that the words "public purposes" in the Irish Act of 1838 extended beyond the purposes of the Crown or the government of the country and meant purposes for the public benefit of the whole community and not for the private use of any individual members of it, in other words purposes for the benefit of the public at large as distinguished from purposes for the benefit of individuals or a class or a locality. This decision of the Exchequer Chamber in the *Londonderry Bridge* case[2] was no doubt arrived at by a majority of four judges to three reversing a unanimous decision of three judges in the Court of Queen's Bench, who had held that public purposes meant only Crown or governmental purposes, and from occasional expressions in subsequent cases one gathers that some later judges who had occasion to consider the statutes would have preferred that the decision arrived at by the Queen's Bench had been allowed to stand. Nevertheless, this decision of the Exchequer Chamber has always been accepted as conclusive in Irish courts. It was recognized as settled law by the Court of Appeal in *Commissioner of Valuation v. Sligo Harbour Commissioners*[3], Lord Ashbourne saying that it had the same place in the law of Ireland as the *Mersey Docks* case[1] had in the law of England. In view of the long period during which the Londonderry case has been accepted as authoritative by the courts in this country I am satisfied that this court would not now be justified in embarking upon a consideration of whether the case was or was not rightly decided.

Since the decision in the *Londonderry Bridge*[2] case a considerable number of cases have come before the courts in which on a wide variety of facts the question has arisen whether premises are entitled to exemption from rating as being altogether of a public nature. The solution of the question depends upon the particular facts of each particular case, and in perusing the judgments it will be found that in seeking to solve the problem the courts have relied upon various circumstances as carrying weight in the various individual cases. But they always return to the basic principle enunciated in the *Londonderry Bridge* case[2] namely, are the purposes for which the premises are used purposes in which the whole community has an interest, purposes for the benefit of the public at large?

[1] (1865) 11 H.L. Cas. 443.
[2] (1868) I.R. 2 C.L. 577.
[3] [1899] 2 I.R. 214, 221.

Moreover, as was pointed out in the Court of Appeal in the case of *Cork Corporation v. Commissioner of Valuation*[1] by O'Brien L.C. that when all the judges who formed the majority of the Exchequer Chamber in the *Londonderry Bridge* case[2] considered it absolutely necessary to emphasize the universally public nature of the right which in that case was held to give exemption, the legitimate inference is that it was clearly their intention that their decision should not extend any further, or as Cherry L.C.J. put in it the same case[3] that in following the *Londonderry Bridge* case[2] we must hold not only affirmatively that "public purposes" include purposes in which all the members of the community are interested, but also, negatively, that they exclude purposes in which a benefit is conferred only on a particular class, or the inhabitants of a particular locality.

So far as educational institutions are concerned I think it has always been the view that the ordinary Irish secondary school managed by a board of governors or trustees was not entitled to claim exemption from liability for rates as being altogether of a public nature or as being used for public purposes. So far as I am aware the point was never brought for decision before the superior Courts until *Alexandra College v. Commissioner of Valuation*[4]. Practically the whole of the judgments delivered in that case were unfortunately concerned with another case raising the same issue (but on substantially different facts) which was decided along with the *Alexandra College* case[4], so that we have not the advantage of a full discussion by the court of the liability to assessment to rates as it concerned a secondary school under the management of a board of governors or trustees. The actual decision of the King's Bench Division, however, was that Alexandra College was not altogether of a public nature or used exclusively for public purposes, nor was the College used exclusively for charitable purposes within the meaning of section 2 of the Act of 1854 as controlled by section 16 of the Act of 1852. I think that this position has always been accepted until the present case. Thus, in *Macdonald v. Commissioner of Valuation*[5], a case in our own courts concerning the valuation of a school, in which 114 out of a total of 144 pupils held free places, it was not sought to be argued that the school was exempt from liability to rates either on the ground that it was altogether of a public nature or used exclusively for public purposes or on the ground that it was

1 [1916] 2 I.R. 77, 109.
2 (1868) I.R. 2 C.L. 577.
3 [1916] 2 I.R. at 119,
4 [1914] 2 I.R. 447.
5 [1943] N.I. 14,

used exclusively for charitable purposes. And it is perhaps interesting to notice that while under the Belfast local Acts certain of the leading secondary schools in Belfast were declared exempt from liability to rates this was construed as conferring exemption only from the various municipal rates and not from the poor rate, and when all the rates leviable in the City were consolidated by the Belfast Corporation Act (Northern Ireland), 1925, these schools were left liable to the proportion of the consolidated rate which represented the former poor rate. The fact that the typical secondary school was not regarded as exempt on the ground that it was of a public nature or used exclusively for public purposes appears to me to be in entire conformity with the decision in the *Londonderry Bridge* case[1]. A student, however clever he might be and however brilliant his attainments, had no legal right as a member of the public to claim admittance as a pupil to such a school. The trustees or governors could admit or reject such pupils as they chose. The soundness of the view that such a school was not entitled to exemption on the ground that it was of a public nature is borne out by the decision in the *Trinity College, Dublin* case[2], where as was pointed out by Molony C.J. no person had a legal right to become a student of the College. This of itself was in my view sufficient to distinguish the case from the *University College, Cork* case[3] in which (among other considerations leading to the conclusion that that College should be regarded as of a public nature) it was pointed out both in the King's Bench Division and the Court of Appeal that the College was open to all classes of people without distinction of rank, creed or sex, and without limitation of locality from which students might come.

In dealing with educational institutions it must of course be conceded that they will not fail to be of a public nature or to be used for public purposes simply because some entrance examination or other test has to be imposed for the purpose of ensuring that pupils or students seeking admittance are fit and qualified to take advantage of the education which the school or college provides. This is fully recognized in the *University College, Cork* case[3] and, indeed, to hold otherwise would be completely unrealistic. But such a school or college cannot in my opinion be held to be of a public nature within the meaning of the statutes if, notwithstanding that an entrance examination is held, the governing body still retains the right to admit or reject pupils at its discretion.

[1] (1868) I.R. 2 C.L. 577.
[2] [1919] 2 I.R. 493, 503.
[3] [1911] 2 I.R. 579; [1912] 2 I.R. 328.

Coming now to the particular case of St. MacNissi's College it is contended on behalf of the Trustees that even if the legal position as regards rateability of secondary schools was as I have indicated, the position has been entirely altered by the Education Act (Northern Ireland), 1947, and that voluntary grant-aided Secondary Schools (or at any rate Group A voluntary schools) ought now to be held to fall within the category of hereditaments of a public nature or dedicated to or used for public purposes as those phrases are used in the Valuation Acts of 1852 and 1854 and the Poor Relief Act of 1838. Undoubtedly, as Mr. McCall contended, there is a great public purpose (to use that phrase in a popular sense) implicit in the Act of 1947, and, undoubtedly, the Act contemplates and expressly provides that Voluntary Grammar Schools should co-operate in achieving that public purpose. But this is not necessarily sufficient to secure the College exemption from rateability. To refer to only one case, the *Trinity College, Dublin* case[1], Trinity College was founded for the purpose of promoting an important public purpose and was actively engaged in pursuing that purpose. But it was not exempt from liability to rates. The question in regard to St. MacNissi's College still is that posed in the *Londonderry Bridge* case[2], is the hereditament of a public nature in the sense that the benefits which it confers are open to all members of the public who are qualified to enjoy them?

It has been pointed out that under the Education Act (Northern Ireland), 1947, and the Regulations made by the Ministry of Education in pursuance of the powers conferred upon the Ministry by that Act, all grant-aided secondary schools and the trustees or governors of such schools are or may become subject to very wide and, in some respects, very stringent powers of regulation and control by the Ministry. Such trustees or governors are, however, not mere sub-committees of the Ministry. In some respects they enjoy a wide degree of freedom. Thus, we were told that one aspect of freedom which the Trustees of St. MacNissi's College regard as essential is that they have the power to appoint the teachers in the school. But for the purpose of determining whether the school premises should be distinguished in the valuation lists as being of a public nature the dominant question according to the authorities is whether they are open to the public at large in the sense that all prospective pupils who are qualified to profit by the education pro-

[1] [1919] 2 I.R. 493. [2] (1868) I.R. 2 C.L. 577.

vided by the school have a legal right to be admitted to it without distinction provided, of course, that there is accommodation available for them.

The Trustees, presumably with the object of qualifying for the grants which may be made to Group A voluntary schools under the Regulations, have elected to have St. MacNissi's College classified as a Group A voluntary school. By so doing they have rendered themselves subject to the provisions regarding the admission of pupils contained in regulation 5 of the Grammar Schools (Admissions, Scholarships and Special Allowances) Regulations (Northern Ireland), 1953. It is suggested that the fetters imposed upon the Trustees by this regulation have the effect of causing the school premises to rank as premises of a public nature.

Paragraph 1 of regulation 5 of these Regulations of 1953 enacts that "The school authorities of every Group A voluntary school "shall reserve for qualified pupils (as defined in the Regulations) "not fewer than 80 per cent. of the places available each school "year for the admission of day pupils to the lower division of the "secondary department of the school" and paragraph 3 of the Regulation directs that "No qualified pupil shall be refused admis- "sion to a Group A voluntary school on other than reasonable "grounds." Then follows a proviso: "Provided, however, that where "the number of qualified pupils seeking admission to the lower "division of the secondary department of a Group A voluntary "school is greater than the number of places reserved for such pupils "in accordance with the provisions of paragraph (1) of this Regula- "tion, the school authorities may select such of the qualified pupils "as appear to them best fitted to profit by the education provided "by the school."

This regulation is far from easy to interpret. The first point which strikes one in regard to paragraph (1) is the question of what is to happen if the number of qualified pupils applying for admission as day pupils is less than 80 per cent. of the places available. If (say) there are 100 places available and only 65 qualified applicants, can the Trustees admit 35 non-qualified pupils or can they only admit 20? But the real difficulty arises on paragraph (3) and the proviso. Is the meaning here that no unqualified pupil may be considered for admission to the school either as a day pupil or boarder until all qualified pupils seeking admission have been provided for? Or does it simply mean that so long as the 80 per cent. of the places available for day pupils have not been filled no qualified pupil shall

be refused admission as a day pupil on other than reasonable grounds but that when there are more qualified applicants than the 80 per cent. of available places the school authorities are at liberty to exercise a power of selection among the applicants and may, if they think proper, admit non-qualified pupils to the remaining 20 per cent. of available places? I think that the reference in the proviso to the number of places reserved for qualified pupils in accordance with paragraph (1) shows that the latter is what is meant by paragraph (3) and the proviso. If the other meaning had been intended I think it is reasonably clear that regulation 5 would have been far differently worded.

If this is the proper construction of regulation 5 then the Trustees are at liberty to admit such unqualified pupils as they choose to the extent of 20 per cent. of the places available for day pupils, and no fetter in regard to their selection of pupils to be admitted as boarders is imposed upon them by the Act or the Regulations.

It is stated in paragraph 3(v) of the case stated that there are at present 191 boarders and 85 day pupils in the school so that the school is preponderatingly a boarding school, and if I am correct in regard to the effect of regulation 5 it does not affect the greater part of the pupils. In paragraph 3(iv) of the case stated it is set out that at present approximately 85 per cent. of the pupils are qualified and 15 per cent. are non-qualified. Does this refer to the total number of pupils in the school or only to the day pupils? In the earlier part of this sub-paragraph (iv) it is stated that the school is obliged to reserve 80 per cent. of its places for qualified pupils. This clearly refers to paragraph (1) of regulation 5 which only applies to places available for day pupils. Do the 85 per cent. and the 15 per cent. then refer only to the day pupils? Moreover, it is to be observed that regulation 5 only deals with the case of pupils seeking admission to the *lower* division of the secondary department of a Group A voluntary school and has no reference to pupils seeking admission to the upper division. Cases must frequently occur where a boy who has passed from the lower division of a secondary school wishes to transfer to the upper department of another school, as, for example, where his parents have moved their residence to a different town. There seems to be nothing in the Regulations to preclude the authorities of the new school, even if it is a Group A school, from either accepting or rejecting the boy as they think fit.

However this may be, the Trustees of St. MacNissi's College have admitted a substantial number of non-qualified pupils. Whatever

may be the legal position as regards qualified pupils none of these non-qualified pupils had any legal right of admittance to the school. So far as I can see the school authorities could in their own discretion have either accepted or rejected any of these non-qualified pupils as they saw proper. In performing his duty under the Valuation Acts the Commissioner of Valuation had to have regard to the provisions of section 2 of the Act of 1854 and section 16 of the Act of 1852, and was entitled to distinguish the premises of St. MacNissi's College as being of a public nature only if they were *altogether* of a public nature. Inasmuch as the Trustees of the College are free to admit and do in fact admit non-qualified pupils who have no legal right to admission and who could be refused admission if the Trustees in their discretion thought proper, it seems to me clear from the whole current of the decisions of the Irish courts from *Limerick Corporation v. Commissioner of Valuation*[1], down to the decision of the Court of Appeal in *Cork Corporation v. Commissioner of Valuation*[2] that the College cannot be said to be altogether of a public nature within the meaning of the Irish Valuation Code. Like Palles C.B. in *Guardians of Waterford Union v. Barton*[3], I do not find it necessary to decide whether the College may in some degree be a hereditament of a public nature. Having regard to the specific wording of section 16 of the Act of 1852 such a decision would be *nihil ad rem.* I would accordingly answer the questions submitted by the learned Recorder by stating that the hereditaments the subject of the appeal, are not altogether of a public nature within the meaning of the Valuation Acts and that accordingly they ought not to be so distinguished in the valuation lists so as to exempt them from rates.

CURRAN L.J.: I have arrived at the same conclusion as that set out in the judgments just delivered.

The questions the court have to consider are: whether the learned Recorder of Londonderry and Acting County Court Judge and Chairman of Quarter Sessions of the County of Antrim was right in law in deciding:

(i) that the hereditaments in question were of a public nature and occupied for the public service or dedicated to or used for public purposes within the meaning of the Acts recited in the title of the notice requesting the case stated; and

[1] (1872) I.R. 6 C.L. 420.
[2] [1916] 2 I.R. 77.
[3] [1896] 2 I.R. 538, 556.

(ii) that accordingly the said hereditaments ought to be distinguished as exempt from liability to rates.

Having regard to the provisions of section 16 of the Valuation (Ireland) Act, 1852, the hereditaments in question are only to be distinguished as exempt from liability to rates if they are *altogether* of a public nature or used *exclusively* for public purposes.

I respectfully agree with the Lord Chief Justice that Group A Voluntary Grammar Schools perform a public purpose, and I do not propose to reiterate the reasons he has so clearly stated for arriving at that conclusion. I refrain, however, from attempting to set out in what precise circumstances it might be held that an educational establishment is *altogether* of a public nature or used *exclusively* for public purposes. In the present case the hereditaments are used, inter alia, for certain purposes which in my opinion are not public, and, accordingly, it matters not to what extent they are otherwise used for public purposes, they should not be distinguished as exempt from liability to rates.

I would accordingly answer questions (i) and (ii) in the case stated in the manner proposed by the Lord Chief Justice.

*Appeal allowed.*

Solicitor for the appellant: *F. C. MacNeice.*

Solicitors for the respondents: *T. H. Cairns & Co.*

S.M.M.

## IN RE BOVILL: MARSHALL & DUFFIN v. BOVILL & OTHERS[1]

*Will—Construction—Specific devise of "my farm on which I reside"—Three separate holdings worked as one farm in testator's lifetime—Averments in affidavit—Admissibility.*

A testator specifically devised "my farm on which I reside together with "all stock, crop, farming implements and household furniture." The testator owned three holdings which he had worked as one farm: on one of these holdings was the dwelling-house in which he had resided. *Held*, that the devise included all three holdings.

Averments in an affidavit commencing with the words "I always under- "stood him to refer to...." and "It never occurred to me...." *held* inadmissible.

ADJOURNED SUMMONS.

Thomas Bovill died on May 26, 1950, and was survived by his second wife and four children of a previous marriage. By his will dated May 17, 1950, he appointed George Marshall and Thomas Duffin to be his executors and made the following disposition: "I leave devise and bequeath my farm on which I reside together "with all stock, crop, farming implements and household furniture "to my wife Eleanor absolutely. I also leave my said wife the sum "of five hundred pounds. The rest, residue and remainder of my "estate I leave in equal shares to my four children subject to the "payment of my just debts."

At the date of his death the deceased owned three holdings of land registered on three separate folios pursuant to the Local Registration of Title (Ireland) Act, 1891, all of which were worked together as one farm during his lifetime, and on one of which was situated the dwelling-house in which he resided. The three holdings were contiguous except for a small portion of one which was separated from the rest of the land on the same folio, and some strips of bogland in an adjoining townland. The holding on which the dwelling-house was situated contained 9 acres 3 roods and 17 perches and the two adjoining holdings contained respectively 7 acres 3 roods and 7 perches and 9 acres 1 rood and 21 perches.

The deceased's will was drawn up by an auctioneer who deposed to the fact that when he asked the deceased what his assets were, the deceased said that he had a farm of about thirty acres, some money lent out on mortgage and a further sum of money in the Provincial Bank. The auctioneer made a note of the instructions

[1] In the Chancery Division before McVeigh J.: Feb. 4, 1957.

for the will, and that note, which was exhibited to the affidavit, did not contain the words "on which I reside."

The affidavit made by the auctioneer contained the following averments:

"I had known the deceased well for about twenty years before his "death. We often met and had conversations together. Whenever "he mentioned his farm, I always understood him to refer to his "three holdings which he worked as one farm and on which he "always lived."

"It never occurred to me when I was taking instructions for his "will that by the expression 'my farm on which I reside' he meant "anything other than his entire holding of about thirty acres."

*Brown Q.C.* and *McSparran* for the executors.
*Porter* for the first defendant.
*MacDermott* for the second defendant.
*Moody* for the other defendants.

MCVEIGH J. stated the facts and continued: The testator's will contained the following words—"I leave devise and bequeath my "farm on which I reside together with all stock, crop, farming im- "plements and household furniture to my wife Eleanor absolutely." He left the residue of his estate to his four children in equal shares. The question for decision is whether the gift of the "farm on which "I reside" applied only to the holding on which the dwelling-house is situated or whether it carried the three holdings which he had worked as one farm.

On reading this will I had little doubt in my own mind at the outset as to what the intention of the testator was, and indeed, listening to counsel, and notwithstanding their arguments, I have a feeling that they were of the same opinion.

The only question, as far as I am concerned, is whether there are any authorities which would prevent me from giving effect to that opinion, but the cases cited have not given me any reason to hesitate. Whilst there is a residuary clause in the present will which distinguishes it some extent from the will considered in *McGonigle v. McGonigle*[1], nevertheless that was a case in which it was held that two separate holdings passed under the word "farm." The case cited by Mr. Porter, *In re Willis*[2], is helpful on the meaning of the words "on which I now reside." Those words were held not to be

[1] [1910] 1 I.R. 297.
[2] [1911] 2 Ch. 563.

a vital and essential part of the description having the effect of cutting down the generality of earlier words.

I have no doubt that when the testator made this will he clearly intended to give his wife the whole of the land, the several plots of which are contiguous (except for the small portions mentioned above) and all of which he carried on as one farm. The view that he intended to give the entirety as a going concern is reinforced when one considers the following words of the will "with all stock, "crop, farming implements." He did not divide up those items and it is quite clear to my mind that he never considered carving up the land which he had always regarded as one unit. Accordingly, I hold that all these lands pass to the testator's wife under this bequest.

The point was taken in the course of argument that certain averments in the affidavit of James Erwin, who drew up the will on the testator's instructions, are inadmissible. In paragraph 5 he states: "I had known the deceased well for about twenty years before his "death. We often met and had conversations together. Whenever "he mentioned his farm, I always understood him to refer to his "three holdings which he worked as one farm and on which he "always lived." That averment is in my view inadmissible in so far as it relates to what the deponent understood though it is agreed by the parties that the deceased, in fact, worked the three holdings as one farm. In paragraph 7 he says: "It never occurred to me when "I was taking instructions for his will that by the expression 'my "'farm on which I reside' he meant anything other than his entire "holding of about thirty acres." That paragraph is also, in my opinion, inadmissible and I rule accordingly.

*Order accordingly.*

Solicitors for the plaintiffs: *J. & A. Caruth & Bamber.*
Solicitors for the first defendant: *James L. Russell & Son.*
Solicitor for the second defendant: *S. Cumming.*
Solicitors for the other defendants: *C. & H. Jefferson.*

S.M.M.

## MORAHAN v. ARCHER & BELFAST CORPORATION[1]

*Practice—Interrogatories—Taxi-cab involved in collision—Claim for loss of trading profits—Defendants seeking details of tax paid by plaintiff in three years before accident—Whether damages recoverable subject to tax.*

In an action in tort claiming loss of trading profits a defendant is not entitled to interrogate with regard to the income of the plaintiff and the tax paid thereon in previous years, as any damages recovered in respect of trading profits would themselves be liable to tax, and consequently the amount of tax payable should not be taken into account in arriving at the figure for damages.

MOTION for leave to deliver interrogatories.

The plaintiff, who traded under the name of Star Taxis, brought an action against the defendants claiming damages in respect of a taxi-cab which had been in collision with an omnibus. The special damages claimed included loss of profits during the time that the taxi-cab was under repair. The defendants asked for particulars (inter alia) of the amount of income of the plaintiff upon which income tax was assessed during each of the three years immediately preceding the accident, and of the amount of tax paid by her for each of the three years. The plaintiff declined to give particulars and the defendants sought leave to deliver the following interrogatories:

1. What was the amount of your taxable income from all sources including that of your husband (if any) in each of the three years immediately preceding the 18th December, 1955, specifying the amount for each year?

2. What was the amount of income tax paid by you or your husband for each of the said years?

3. What was the amount of sur-tax paid by you or your husband for each of the said years?

4. What was the maximum rate of tax paid by you or your husband in each of the said three years?

An application was made ex parte and Lord MacDermott L.C.J. having directed that it should be made on notice, the present motion was brought.

*Gibson Q.C.* and *Moody* for the defendants. Having regard to the decision in *British Transport Commission v. Gourley*[2] any damages to which the plaintiff may be entitled in respect of loss of profits

[1] In the Queen's Bench Division before Curran L. J.: Nov. 30, 1956.
[2] [1956] A.C. 185.

ought properly to be reduced by whatever amount of tax the plaintiff would have had to pay on those profits. For that reason the defendants are entitled to know what that amount would have been. In *West Suffolk County Council v. Rought*[1] it was held that compensation for compulsory acquisition of factory premises, in respect of loss of profits should be reduced by the amount of tax which the company would have incurred on those profits. That the principle requiring tax liability to be taken into account in assessing damages applies to claims other than claims for personal injuries is clear from *Beech v. Reed Corrugated Cases*[2]. There is no distinction in principle between those cases and the present and the defendants should be in a position to assess the amount by which the plaintiff's damages would be reduced in respect of tax liability.

*Higgins* for the plaintiff. In *The Burmah Steamship Co. Ltd. v. The Commissioners of Inland Revenue*[3] it was held that a sum awarded as compensation for loss of trading profits was liable to income tax. On the authority of that case any damages recovered by the plaintiff would be liable to tax. That being so there could be no question of reducing the amount of damages, and the defendants cannot therefore be entitled to the information sought in the proposed interrogatories.

CURRAN L. J.: The defendants claim that they are entitled to obtain answers to these interrogatories on the basis that the damages recovered by the plaintiff in respect of loss of profits would have to be reduced by taking into account the amount of tax liability on those profits, and they rely on the decision in *British Transport Commission v. Gourley*[4]. In my opinion, in order to bring themselves within that case, the defendants have to show that the plaintiff would not be liable for tax on the damages actually recovered.

Prima facie it would seem that when tax is payable on profit it must also be payable on any sum obtained as compensation for the loss of that profit, and the *Burmah Steamship* case[3], cited on behalf of the plaintiff, clearly indicates that any damages recovered under this head would, in fact, be liable to tax. No doubt there might be some practical difficulty in deciding what proportion of the damages recovered would be attributable to loss of profits, but that would be a matter between the plaintiff and the Inland Revenue authorities. The cases relied upon by the defendants are not in point as they appear to have been decided on the basis that no tax would be pay-

[1] [1956] 3 All E.R. 216.
[2] [1956] 2 All E.R. 652.
[3] [1931] S.C. 156.
[4] [1956] A.C. 185.

able on the damages recovered. Accordingly I am of opinion that the defendants are not entitled to interrogate as to the plaintiff's position with regard to income tax.

*Application refused.*

Solicitor for the defendants: *Samuel Love.*

Solicitor for the plaintiff: *Thomas A. McKeever.*

S.M.M.

## EDGAR v. WALLACE[1]

*Bastardy — Affiliation proceedings — Evidence — Corroboration — Illegitimate Children (Affiliation Orders) Act (Northern Ireland)*, 1924 (14 & 15 *Geo.* 5, *c.* 27), *s.* 1(3)(c).

In bastardy proceedings the complainant's case was that the defendant had sexual intercourse with her on several occasions on the back seat of his motor car. A witness called by the complainant testified that one evening when it was getting dark he had seen the complainant and defendant lying "courting" on the back seat of the car which was parked without lights on a country road. *Held*, that as such evidence showed not only that the parties were together at the time alleged but also that they were sexually interested in each other, it went beyond evidence of mere opportunity, and accordingly was capable of amounting to corroboration of the complainant's case.

CASE STATED by the County Court Judge of Down.

The facts appear sufficiently in the headnote and in the judgment of the Lord Chief Justice.

*Stewart Q.C.* and *Kelly* for the defendant. The corroboration required by section 1(3)(c) of the Act of 1924 is something which strongly supports the complainant's case—something which shows not merely that her evidence is possibly true, but that it is at least probably true. The examples of corroboration in the authorities fall into three classes:

1. admissions (which are irrelevant in this case);
2. evidence of long association;
3. evidence of particular facts revealing some impropriety of conduct, indecent familiarity or something of that kind—an incongruous relationship might suffice.

*Dunn v. Chalmers*[2] and *Moore v. Hewitt*[3] are examples of the second class. Where, however, there is no evidence of long association, it is necessary that there should be evidence of impropriety or some of the other matters referred to, otherwise there is evidence only of opportunity, which has often been held insufficient: see, for example, *Holland v. Roberts*[4].

[LORD MACDERMOTT L.C.J.: My impression is that it has often been held on Assizes that the fact that the parties were sexually

[1] In the Court of Appeal before Lord MacDermott L.C.J. and Black and Curran L.JJ.: Nov. 23, 1956.
[2] (1875) 3 R. 235.
[3] [1947] 2 All E.R. 270.
[4] (1938) 158 L.T. 313.

interested in each other at the material time can amount to corroboration. It might, for example, be that they were seen in each other's arms in a lane.]

We submit that would not be corroboration, unless the embrace were indecent; and that, as in the present case, such evidence would be no more than opportunity.

They referred also to *R. v. Martin and others*[1] and *Harvey v. Anning*[2].

*Rowland* for the complainant was not called upon.

LORD MACDERMOTT L.C.J.: The question for the decision of the court in this case is whether sufficient corroborative evidence was given on the hearing of an application for an order under the Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924, to satisfy the requirements of s. 1(3)(c) of that Act, which provides that the court shall not make an affiliation order unless the evidence of the mother is corroborated in some material particular by other evidence to the satisfaction of the court.

The complainant, who is respondent in this court, applied at Petty Sessions for an order under the Act against the defendant and appellant, alleging that he was the father of a child born to her on January 17, 1954. The application was dismissed by the resident magistrate who acceded to a submission made on behalf of the defendant at the conclusion of the complainant's case that no corroborative evidence had been adduced to satisfy the provisions of the statute to which I have referred.

The complainant appealed against the decision of the resident magistrate to the county court judge and, when the appeal came on for hearing, substantially the same evidence was given on behalf of the complainant as at Petty Sessions, but with the important addition of the evidence of a witness named Samuel Fee, to which I shall refer later. The complainant herself said in evidence that the defendant had had sexual intercourse with her in the back seat of his black Austin motor car at a place called Windy Gap in the month of April, 1953; that he again had intercourse with her in the back seat of his car at Windy Gap later in the same month; that in the months of May and June, 1953, he had intercourse with her on several occasions in a car at the foot of her own laneway, and once in a field near the Post Office; and that as a result, she became pregnant and gave birth to a male child on January 17, 1954. There was

[1] (1934) 24 Cr. App. R. 177. [2] (1902) 87 L.T. 687.

other evidence that the parties had been seen driving in a car together in the vicinity of Windy Gap in April, but the evidence given by Samuel Fee is more important, and is set out by the county court judge in the case stated as follows:

"Samuel Fee gave evidence that one evening in the month of "April, 1953, he was walking from Leitrim to his home in Bally-"macarainey....It was after 8 p.m. and it was getting dark at the "time. At Windy Gap he saw a black Austin car"—which was the same kind and colour as the car to which complainant had referred —"parked at the side of the road without lights; he thought it had "broken down and stopped beside it; knew the car—saw it at foot-"ball matches; saw some ones courting in the back of the car; they "were lying in the back seat of the car; the man and girl were talking "and laughing; I knew their voices; they were John Wallace and "Mary Edgar; I knew them."

I focus my attention on that evidence because, if it does not amount to corroboration, my opinion is that there was no other evidence sufficient to comply with the statute, and that the defendant's appeal should succeed. There can be no doubt as to the relevance of this evidence, which goes to show that the parties were together in the back seat of a car, such as that described by the complainant, at the material time. It is said, however, that this is not sufficient corroboration, and that it is merely evidence of opportunity and is not enough in the circumstances. Now it is easy in a case like this to stray from the real question of law, which is whether the evidence could amount to corroboration, to a consideration of the weight of the evidence. But this court does not have to concern itself with that consideration; if we are satisfied that the evidence in question can amount to corroboration, then we must hold that the county court judge was entitled to take the view that it did corroborate the evidence of the complainant, and to make an order on the basis of the corroborative evidence and the other evidence before him.

I have reached the firm conclusion that the evidence of Samuel Fee does corroborate the evidence of the complainant in a material particular. In my opinion this is not at all a borderline case. It is a clear one. The evidence goes far beyond opportunity, for it shows that the parties were not only together but were sexually interested in each other at the material time.

For the reasons stated, I would answer the question asked in the case stated by saying that the county court judge was correct in deciding that the evidence called on behalf of the complainant suffi-

ciently corroborated her evidence in a material particular, and I would, accordingly, affirm the order which he has made.

BLACK L.J.: I agree, and have nothing to add.

CURRAN L.J.: I also agree, and would only add that this seems to me to be a clear case.

*Appeal dismissed.*

Solicitor for the defendant and appellant: *John Gallery.*

Solicitors for the complainant and respondent: *F. J. Byrne & Co.*

J.P.

## McCOMISH v. HILLIS & OTHERS[1]

*Practice—Remittal motion—Injuries not of serious nature.*

In an action for damages for personal injuries the defendants moved to remit the action on the grounds, (i) that the plaintiff's injuries were not of a serious nature, (ii) that the defendants had a good defence in law and on the merits, and (iii) that the plaintiff had no visible means of paying costs. The plaintiff objected to the action being remitted on the grounds, (i) that the injuries, viz., severe nervous shock and anxiety neurosis, were sufficiently serious to justify the retention of the action in the High Court, and (ii) that substantial questions of fact and law were involved.

*Held*, that as the evidence contained in the medical affidavits was not such as to support the plaintiff's contention that the injuries were of a serious nature, and that as any question of law which might arise could be determined on a case stated, the action should be remitted.

MOTION to remit.

The plaintiff's claim was for damages for personal injuries alleged to have been caused by the negligence of the driver and conductor of a trolley bus from which the plaintiff was alighting. Her actual physical injuries were slight but the affidavit of a neurological surgeon stated that she complained of nightmares and unreasonable fears about traffic and accidents to her children, inability to concentrate or remember things and a feeling of numbness in her forehead and in her right knee. He stated that there was organic brain injury but that the plaintiff had suffered severe nervous shock and anxiety neurosis and that this would continue for at least six months. The defendants moved to remit the action to the Belfast Sessions.

*Moody* for the defendants. The defendants wish to have this action remitted on the grounds: (i) the plaintiff's injuries are not of a serious nature and she has suffered no serious or permanent disability; (ii) the defendants have a good defence at law and on the merits as they are not guilty of the alleged or any negligence, and (iii) the plaintiff has not got any visible means.

On the first point it is clear from the medical affidavit produced by the plaintiff that her symptoms are purely subjective and that there is no evidence of any permanent disability. The situation is very different from that in *Garbett v. Cooper*[2] where there was a conflict between the medical affidavits of the plaintiff and defendant. Even taking the full value of the plaintiff's case it is unlikely that a jury would award more than £100. In *Greenaway v. Belfast Street Tramway Co.*[3], the facts of which were practically on all fours with

[1] In the Queen's Bench Division before Black L.J.: Nov. 11, 1956.
[2] [1934] N.I. 129.
[3] (1902) 36 I.L.T.R. 208.

those in this case, the action was remitted even though at that time the limit of the county court jurisdiction was only £50. The onus is on the plaintiff to show that the case is one fit to be retained in the superior court, and this, it is submitted, the plaintiff cannot do in view of the nature of the injuries alleged and the fact that she suffered no loss of earnings, the special damage claimed being only £21. The plaintiff could not possibly suffer any hardship if this case were remitted.

*Kelly* for the plaintiff. The two main reasons for having this case retained in the High Court are that the plaintiff's injuries are quite serious enough to justify a verdict of over £100 and that the case involves substantial questions of fact and law. In this case the plaintiff has sued not only the Corporation, but also the conductor and driver of the trolley bus, thereby raising the whole question of the duty of the Corporation, the conductor and the driver, jointly or severally, requiring the determination of mixed questions of law and fact. The question of whether or not the conductor should always be on the platform when passengers are alighting is one of considerable public importance.

It is true that the actual physical injuries suffered and damage sustained by the plaintiff were quite small, but it is not true to suggest that the plaintiff is merely suffering from a litigation neurosis. The anxiety neurosis of which she complains is eminently probable when one recollects that she was dragged along the road with her baby in her arm. Her neurotic preoccupation with the possibility of danger to her children is quite reasonable after that experience.

BLACK L.J.: I think that this is clearly a case which should be tried in the Recorder's Court. The evidence contained in the affidavit of the neurological surgeon on behalf of the plaintiff is not at all strong or of such nature as to make me think that this is a case of such seriousness as to justify retaining it in the High Court. It can be tried more cheaply and expeditiously in the Recorder's Court and any question of law arising may be determined on case stated.

*Action remitted.*

Solicitor for the defendants: *Samuel Love.*

Solicitor for the plaintiff: *John M. Hughes.*

S.M.M.

## McCONNELL v. LYNCH-ROBINSON; COULTER & SON, THIRD PARTY[1]

*Practice—Third party procedure—Right to contribution—Tort or contract—Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937 (1 Edw. 8 & 1 Geo. 6, c. 9), s. 16(1)(c)—R.S.C. Or. 16, r. 48.*

A defendant who is sued in tort cannot join a third party for the purpose of claiming contribution under section 16(1)(c) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, unless he can show that if the plaintiff had sued the proposed third party the claim would have been in essence a claim in tort and not in contract.

APPEAL against an order of Sheil J. refusing an application for third party directions.

In this action a building owner sued his architect whom he had employed in connection with the building of a house in Ballymena, the substance of the claim being that the damp-course of the house had been faultily constructed by being placed above, instead of at or below, floor level. It appeared that the contract drawings provided for the damp-course being placed in a normal and proper position. The architect sought to join the building contractor as a third party and took out a summons for third party directions. Sheil J. refused the application and ordered that the third party be struck out. The architect appealed to the Court of Appeal.

*Nicholson Q.C.* and *Gibson* for the appellant.
*MacDermott* for the third party.
*Watt* for the plaintiff.

LORD MACDERMOTT L.C.J. stated the facts and continued: The defendant relies upon rule 48 of Order 16 which deals with third party procedure. It is important to refer to the first sentence of that rule as it is there that one finds the basis of the jurisdiction to bring in third parties. This sentence reads: "Where a defendant claims to "be entitled to contribution or indemnity over against any person "not a party to an action, he may, by leave of the Court or a Judge, "issue a notice (hereinafter called a third-party notice) to that "effect. . . ." In this case no contract of indemnity is alleged, but the defendant claims that he is entitled to contribution under section 16(1)(c) of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937, which enacts that "any tortfeasor liable in respect of "that damage"—that is, damage suffered by any person as a result of a tort—"may recover contribution from any other tortfeasor who

[1] In the Court of Appeal before Lord MacDermott L.C.J. and Black L.J.: March 5, 1956.

"is, or would, if sued, have been, liable in respect of the same damage, "whether as a joint tort-feasor or otherwise. . . ." I need not read the rest of the paragraph, but it will be noticed that the right or liability to contribution arises only if the defendant and the proposed third party are both tort-feasors, though not necessarily in respect of the same tort. It is under that paragraph that the defendant says he would be entitled to contribution should the plaintiff succeed against him.

The question whether the plaintiff has sued the defendant in contract or in tort, or whether his remedy lies in contract or in tort, are matters on which I need not express an opinion. They raise interesting considerations of law, but for the purposes of this appeal I shall proceed upon the assumption that the action is one of tort and that the defendant is to be treated as a tort-feasor. However, in order to establish his right to contribution, the defendant has to show that, prima facie, the building contractor was also a tort-feasor, contributing to the same damage.

It is quite clear that under the building contract the building contractor was bound to construct the damp-course in accordance with the drawings and specifications provided by the architect. The defendant alleges that the damp-course was in the wrong place and that if it had been in the proper place the damage would not have occurred. That points to a breach of a specific stipulation in the building contract, but the defendant says that it also points to a breach of the duty to exercise reasonable care. I cannot follow the defendant's argument on this. If the plaintiff has any claim against the building contractor it is clearly in respect of breach of contract and I can see no ground for saying that over and above that there is a claim in tort simply on the basis that the contractor did something which a reasonable man would not have done. If the plaintiff had sued the contractor the issue for the jury would not have been whether it was negligent to put the damp-course where it was put; it would have been whether or not what was done was contrary to the terms of the contract. In the circumstances I cannot see how the proposed third party can be considered a tort-feasor as well as the defendant, and for that reason I think that the order made by Sheil J. was right and that the appeal must be dismissed.

It appears—and I mention this to show that it has not been overlooked—that Sheil J. placed some emphasis on the fact that the architect had issued a final certificate. It has been submitted by the

defendant that this was an irrelevant matter, and under clause 24, paragraph (f) of the contract it is quite clear that the issue of a final certificate does not entirely preclude an action by the building owner against the building contractor; such an action, for example, may lie in respect of defects which a reasonable examination would not have disclosed. Nevertheless, the issue of the certificate has put a substantial difficulty in the plaintiff's way if he sues the contractor as it puts on the plaintiff the burden of proving that the defects in question were discoverable on reasonable examination. Thus the issue of the certificate could be a matter which might well weigh with the learned judge in the exercise of his discretion.

I have, however, reached my conclusion independently of that consideration, being of opinion that the defendant has not made out a prima facie case that he is entitled to contribution against the third party. I must, therefore, dismiss the appeal with costs.

BLACK L.J.: I agree. The making of an order under Order 16, rule 48 is in the discretion of the court, and even putting the defendant's application at its highest it could not be said to be clearly within the scope of the rule. I entirely agree that if the plaintiff had sought to sue the builder his claim would have been in essence a claim in contract. Looking at the writ and statement of claim in the present case the claim appears to be framed in tort, but it would be possible to spell out a claim in contract. In *Steljes v. Ingram*[1] an action against an architect for not using due care and skill in supervising the erection of a house was held to be an action in contract. However this may be I am satisfied for the reasons stated by the Lord Chief Justice that the defendant is not entitled to a third party order against the builder.

*Appeal dismissed.*

Solicitors for the appellant: *Daniel O'Rourke & Son.*
Solicitor for the third party: *Samuel Cumming.*
Solicitors for the plaintiff: *Boal & Anderson.*

S.M.M.

[1] (1903) 19 T.L.R. 534.

## McFALL v. McCREDY[1]

PRACTICE NOTE

*Practice—Separate actions—Actions by driver and his passenger arising out of accident—Order for trial together.*

A husband and wife were injured in a collision between a motorcycle ridden by the husband, on which the wife was a passenger, and a car driven by the defendant. Separate writs were issued on behalf of the husband and the wife, and before statements of claim were delivered the defendant moved to have both actions tried together.

It was contended by counsel for the defendant that the material facts on the issue of negligence were the same in each action, and both plaintiffs were essential witnesses on the issue of damages in each action, and that the two actions could be conveniently, cheaply and expeditiously tried together without prejudice or embarrassment to either plaintiff. The case of *Craig v. Hamill*[2] was cited in support of the defendant's contentions.

For the plaintiffs *Craig v. Hamill*[2] was distinguished on the ground that statements of claim had been delivered in that case and the issues defined. It was further argued that should contributory negligence be alleged against the husband it would not now be a bar to his succeeding, and the jury might be moved to reduce the wife's damages in view of the fact that the husband had himself recovered damages.

Black L.J. made an order that the actions be tried together on the ground that it would be in the interests of all parties to keep down costs and that no injustice would thereby be done.

S.M.M.

[1] In the Queen's Bench Division before Black L.J.: Nov. 16, 1956.
[2] [1936] N.I. 78.

# IN RE McWHINNEY, DECEASED
# MINISTRY OF FINANCE v. McWHINNEY & OTHERS[1]

PRACTICE NOTE

*Estate Duty—Information required to be furnished by a person "whom the Commissioners believe to have taken possession of or administered any part of the estate"—Motion for such information—Form of order—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 8—*Crown Proceedings Act*, 1947 (10 & 11 *Geo.* 6, *c.* 44), *s.* 14(*c*)—*Northern Ireland (Crown Proceedings) Order*, 1949 (*S.I.* 1949, *No.* 1836), *art.* 26—*R.S.C. Or.* 54*D.*

The Ministry of Finance for Northern Ireland applied to the court by motion on notice pursuant to section 14(c) of the Crown Proceedings Act, 1947, as applied to Northern Ireland[2], and Order 54D of the Rules of the Supreme Court, for an order that the respondents, the widow and two of the sons of Hugh McWhinney, deceased, furnish information required to be furnished by them under section 8 of the Finance Act, 1894[3], and all other provisions in that behalf. The information sought was specified in the notice of motion, and concerned in particular a sum of about £50,000 in cash which the deceased was believed to have had in his possession shortly before his death.

The motion was supported by two affidavits, one sworn by a daughter of the deceased and the other by the Chief Examiner of the Ministry of Finance, in which it was deposed that the deceased had a sum of about £50,000 in cash in a safe at his dwelling-house a few months before his death; that each of the respondents had had possession of assets forming part of the estate of the deceased; and that full and proper disclosure of the assets of the deceased had not been made by the respondents. No replying affidavits were filed on behalf of the respondents.

[1] In the Queen's Bench Division (Revenue) before Lord MacDermott L.C.J.: March 28, 1957.

[2] Crown Proceedings Act, 1947, s. 14, as applied to Northern Ireland by the Northern Ireland (Crown Proceedings) Order, 1949, art. 26: "14. Sub-"ject to and in accordance with rules "of court, the Crown may apply in "a summary manner to the High "Court:—.....
"(c) for the furnishing of informa-"tion required to be furnished by "any person under the enactments "for the time being in force in "Northern Ireland relating to "death duties;"

[3] Finance Act, 1894, s. 8(5): ".... "Every person....whom the Com-"missioners believe to have taken "possession of or administered any "part of the estate in respect of "which duty is leviable on the death "of the deceased....shall, to the "best of his knowledge, and belief, "if required by the Commissioners, "deliver to them and verify a state-"ment of such particulars together "with such evidence as they may "require relating to any property "which they have reason to believe "to form part of an estate in respect "of which Estate duty is leviable on "the death of the deceased."

At the hearing of the motion no order was sought against the widow. Counsel for each of the two remaining respondents contended that any order made against them should be confined to such property as had been shown, prima facie, to have been in his possession, and that one respondent should not be required to give information with regard to property which had been received by another.

LORD MACDERMOTT, rejecting these contentions, made the following order:

"It is ordered that within twenty-eight days from the date of "this Order each of the Respondents, Andrew McWhinney and "Hugh McWhinney, do furnish to the Applicant and verify on "oath to the best of his knowledge and belief the information "relating to the property which formed part of the estate of "Hugh McWhinney deceased at the time of his death or was "derived therefrom or which belonged to the said deceased within "three years prior to his death and which is specified more par-"ticularly in the Schedule hereto.

"*Schedule*

"1. Particulars of a sum of money consisting as the Applicant "believes of at least £50,000 in cash kept by the deceased in a "safe, stating

"(i) the amount of the said cash;

"(ii) the manner in which it was disposed of either before or "after the death of the deceased;

"(iii) the names of all persons who received the said cash or any "part thereof either within three years immediately pre-"ceding the death of the deceased or after his death;

"(iv) the present whereabouts of the said cash or any part there-"of or any property representing the same or any part "thereof."

"2. Particulars of all other monies (particularly notes, coins "etcetera) which at any time within the period of three years "ending with the death of the deceased were in

"(i) the possession or ownership of any of the Respondents; or

"(ii) the possession or ownership of the deceased

"stating full details of all dealings with or relating to the said

"monies both prior to and since the death of the deceased, to-
"gether with all relevant dates, amounts and names of recipients
"of the said monies or any part thereof."

J.P.

# H.M. POSTMASTER-GENERAL v. LONDONDERRY RURAL DISTRICT COUNCIL[1].

*Malicious injury—Cutting and larceny of telephone wires—Measure of compensation—Grand Jury (Ireland) Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 135—*Malicious Damage Act*, 1861 (24 & 25 *Vict.*, *c.* 97), *s.* 37—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict.*, *c.* 37), *s.* 5(1).

The applicant claimed compensation for damage to a telephone system occasioned by the cutting and taking away of a quantity of wire.

*Held*, that though the primary motive was the larceny of the wire, there had been malicious damage within the relevant legislation, but as the larceny was neither a natural and direct consequence of the malicious act nor part and parcel of the act of destruction the applicant was not entitled to compensation in respect of the full value of the stolen wire, but could recover only the difference between the cost of the new wire and the salvage value of the stolen wire plus the cost of connecting up the severed ends of wire which had not been stolen.

CASE STATED by Sheil J. sitting as Judge of Assize.

On December 22, 1955, at Donneybrewer, County Londonderry, part of the Postmaster-General's telephone system was seriously damaged. Many strands of copper wire which were carried overhead by a series of pylons were removed by being cut close to where they were attached to the pylons. The Postmaster-General applied to the county court for compensation for the loss sustained, alleging that the damage was wanton and malicious, and that he was entitled to compensation under the provisions of section 5 of the Local Government (Ireland) Act, 1898. The county court judge made an award in the sum of £135 with costs and the respondents appealed to Assizes. Two questions were raised before Sheil J. at the hearing of the appeal. The first was whether, in the circumstances of the case, the Postmaster-General was entitled to recover any compensation under section 5 of the Act of 1898; and the second related entirely to what the compensation should be if the first point were determined in the Postmaster-General's favour. Sheil J. found the following facts:

(a) That the wire which was missing was removed not for the purpose of damaging the telephone system but was an act of larceny.

(b) That no damage was done to the telephone system apart from the larceny of the wire, but that, the wire having been cut out and stolen, the telephone system was damaged.

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black L.J. and McVeigh J.; May 8, June 14, 1957.

(c) That if the stolen wire were found it could not be used again at the same places, because having been cut it would not stretch between adjoining pylons.

(d) That replacement would require the use of new wire, but that the applicant had not effected any replacement of stolen wire at the date of hearing the appeal, and such replacement would not be considered unless a state of national emergency arose.

(e) That the cost of new wire to replace the stolen wire was £137 13s. 4d.

(f) That the value of the wire stolen was £133 0s. 0d.

(g) That the difference in price between new and used wire was 1d. per pound.

(h) That the applicant had in addition expended the sum of £4 17s. 6d. upon the telephone system in connecting up strands of wire which had not been stolen.

On these facts Sheil J. found the Postmaster-General entitled to compensation and measured the amount at £142 10s. 0d. being the cost of new wire plus the sum expended in connecting up, but ignoring the odd pence. On the application of the respondents he stated a case for the opinion of the Court of Appeal on the following questions:

(i) Whether upon the facts of the case the applicant is in law entitled to recover compensation under the provisions of section 5 of the Local Government (Ireland) Act, 1898?

(ii) If the applicant is in law entitled to recover compensation whether the amount of compensation recoverable by him should be £142 10s. 0d. or £9 10s. 0d.?

*Lowry Q.C.* and *MacDermott* for the Rural District Council. It is conceded that the cutting down and removal of the wire was a crime coming within section 37 of the Malicious Damage Act, 1861, and therefore gave rise to a right to apply for compensation under section 135 of the Grand Jury (Ireland) Act, 1836, as extended by section 5 of the Local Government (Ireland) Act, 1898. What this appeal seeks to question is the decision of Curran J. in *Postmaster-General v. Down County Council*,[1] and we rely on the principles to be extracted from *McDowell v. Dublin Corporation*[2] and *Getty v. Antrim County Council*[3]. In the former case Holmes L.J. said[4]: "It is perhaps "anomalous that the owners of property can claim compensation "for injury to the window, and not for the loss of the jewellery.

[1] (1956) 90 I.L.T.R. 74.
[2] [1903] 2 I.R. 541.
[3] [1950] N.I. 114.
[4] [1903] 2 I.R. at 556.

"Legislation has not yet gone so far as to make the ratepayers "answerable for the depredations of a thief, and this is something "to be thankful for, but until the law is changed they must pay for "wilful destruction of or injury to property even when the object "of the culprit is to commit a larceny." In *Getty's* case[1], Black L.J. said: "When, however, damage or injury has been maliciously "caused to property, and goods are stolen as a natural and direct "consequence of that malicious damage or injury, then in calculating "the amount of compensation to be awarded, the value of the goods "so stolen should be included as being part of the loss sustained by "reason of the malicious damage." He goes on to emphasise that the larceny must be the "natural and direct consequence" of the malicious damage and instances *Tyler & Sons v. Cork County Council*[2]. *Getty's* case[3], which was heard and argued in Belfast and in which the authorities were collected and reviewed, was not questioned by Curran J. in the *Down County Council* case[4], which was a case heard at Assizes.

Compensation may be awarded for loss consequential on malicious injury: *Robinson v. Tyrone County Council*[5]; and in some circumstances larceny may be consequential, but to put forward that argument in the present case would be to confound sequence with consequence. In *Leyburn v. Armagh County Council*[6], the Court of Appeal took the view that the decision in *Tyler's* case[2] had been carried too far and that *Kirby v. Kerry County Council*[7] had been wrongly decided. *Congested Districts Board v. Mayo County Council*[8] was a stronger case than the present in that there was fairly strong evidence of concerted malice, but nevertheless the award of compensation in that case in respect of timber which had been cut down and carried away has since been criticised as having been made on a wrong principle: *Getty's* case[3]; *Kennedy v. Ministry of Finance*[9]. In the latter case Kennedy C.J. went so far as to suggest that the effect of the Damage to Property (Compensation) Act, 1923, an Act of the Irish Free State legislature, which excluded compensation for consequential damage, was to restore the true legal position which had become obscured. Though this opinion seems to go too far (see *Nicholson & Morrow v. Belfast Corporation*[10])—it nevertheless offers

1 [1950] N.I. at 121.
2 [1921] 2 I.R. 8.
3 [1950] N.I. 114.
4 (1956) 90 I.L.T.R. 74.
5 [1952] N.I. 54.
6 [1922] 2 I.R. 58.
7 [1921] 2 I.R. 388.
8 (1920) 55 I.L.T.R. 4.
9 [1925] 2 I.R. 195.
10 [1943] Ir. Jur. R. 26.

a salutary warning against the tendency to extend the operation of the malicious injury code beyond its intended scope.

*Jones Q.C.* and *Babington* for the Postmaster-General. The malicious injury code being an artificial one it is inevitable that the distinctions made under it must also be artificial, and each case has to be considered individually. The first step is to see whether a malicious injury has occurred, and, if so, whether it falls within the ambit of the code which gives the right to compensation. In the present case there is an express finding that the property injured was the telephone system. The damage was not just to the wire actually cut but to the system as a whole. There is a further finding to the effect that had the wire been found it could not have been used to repair the damage to the system because, having been cut, it could not now be stretched between the pylons. New wire, therefore, being necessary to reinstate the system, the actual damage includes the cost of replacing the wire which happened to have been stolen. In the circumstances this is far from being a claim for compensation for larceny. The basis of the claim is criminal injury to property. If the old wire had been left lying on the ground its value could have been taken into account as salvage, but in this case there is no question of salvage. Section 37 of the Malicious Damage Act, 1861, provides: "Whosoever shall "unlawfully and maliciously cut....or remove any....wire... " Removal of wire from a telegraph system is therefore a specific crime. The award of compensation in *Congested Districts Board v. Mayo County Council*[1] has been criticised, but the present case is clearly distinguishable because if the lengths of wire had been recovered it would not have made any difference to the extent of the applicant's injury. For the same reason the facts are very different from those in *Leyburn's* case[2] but are rather similar to those in *Taggart v. Belfast Corporation*[3]. In that case compensation was awarded in circumstances where a building had been damaged in the course of a theft and the measure of damage was the cost of reinstating the building even though that involved taking into account the replacement of material stolen.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J.: On December 22, 1955, at Donneybrewer, County Londonderry, part of the Postmaster-General's telephone system was seriously damaged. Having regard to the date of the damage, the Criminal Injuries Act (Northern Ireland), 1956, has

[1] (1920) 55 I.L.T.R. 4.
[2] [1922] 2 I.R. 58.
[3] (1917) 51 I.L.T.R. 160.

no application and I must make it clear that the references I am about to make to the law and to the malicious injuries code are not intended to include or notice any of the changes which that Act has effected in the statutory position.

[His Lordship then stated the facts and continued]:

Section 135 of the Grand Jury (Ireland) Act, 1836, provided for the payment of compensation at the expense of the ratepayers "in "all cases of maliciously or wantonly setting fire to, burning or des- "troying. . . ." certain kinds of property as therein specified. By section 5 of the Local Government (Ireland) Act, 1898, this provision was extended to property of any description, provided the malicious act was a crime punishable on indictment under the Malicious Damage Act, 1861.

Though the dominant purpose of the damage done in this case was larceny, it seems clear that the actual severance of the copper wires was a malicious act punishable under the Malicious Damage Act of 1861 and the subject of compensation under section 5 of the Act of 1898: see *McDowell v. Corporation of Dublin*[1]. This was conceded by Mr. Lowry on behalf of the respondents and it was accordingly agreed that the first question submitted by the learned judge should be answered in the affirmative. This leaves as the real issue for determination, the effect of the larceny of the severed wire on the quantum of compensation.

It is clear that larceny simpliciter is not a subject for compensation under the malicious injuries code. At the end of his judgment in *McDowell v. Corporation of Dublin*[2] Holmes L.J. said: "Legislation "has not yet gone so far as to make the ratepayers answerable for the "depredations of a thief, and this is something to be thankful for, but "until the law is changed they must pay for wilful destruction or "injury to property even when the object of the culprit is to commit a "larceny." That remains settled law in relation to cases of what I have called larceny simpliciter, and there the value of the articles stolen can form no part of the award.

But the authorities show that in certain circumstances the compensation decreed can properly take into account the value of what is stolen. It is easy enough to see that in cases that are clearly within this category the depredations cannot be described as larceny simpliciter; but the decisions show that much difficulty has been experienced in drawing a clear line between what is and what is not compensat-

[1] [1903] 2 I.R. 541. [2] Ibid. at 556.

able in this field. The decisions, indeed, are far from consistent but, broadly speaking, the position seems to be that compensation in respect of the loss of property stolen will be payable only if—(i) such loss is the natural and direct consequence of the actual malicious or unlawful act; or (ii) the larceny is really part and parcel of the malicious damage or destruction.

*Tyler & Sons v. Cork County Council*,[1] is the outstanding example of the first of these sub-categories. There, a number of rioters demolished the front of a boot shop and in the course of the rioting a large part of the stock-in-trade was thrown on the streets and into neighbouring premises. Some of the stock thus exposed or dispersed was recovered, but much remained missing and was found to have been stolen by unascertained persons who took the opportunity of plundering during the confusion caused by the riot. The rioters were soldiers who had got out of hand following an attack by a body of civilians the day before, and it was found that the soldiers had broken the shop-front and had scattered the stock-in-trade in the course of the riot, but had no intention of stealing and did not steal any part of what was lost. It was also held that the loss of the stock-in-trade was the immediate result of the wrecking of the premises by the rioters and the scattering about and exposing of the shopowners' goods. The Court of Appeal (O'Connor L.J. dissenting) held that the shopowners were entitled to compensation for the loss of the goods which had thus been stolen on the ground that the larceny was the natural and probable consequence of the malicious act of demolishing the shop-front and scattering the goods.

In the second of the sub-categories I have mentioned the act of injury or destruction involves an asportation of the property in question, or of some part or parts thereof, which in law amounts to larceny, although larceny was not the purpose of the unlawful conduct. *Ryan v. County Council of Tipperary*,[2] is sometimes cited as an example of this class. There, a motor-cycle, the property of a policeman, was taken from his residence by armed men and never seen again. Its tracks were afterwards found on the way leading to a lake. They were visible near the edge of the lake and were not to be seen beyond it. O'Connor L.J. gave a decree, taking the view that the sole object of removing the machine was to impede the police and that there was reason to believe that the bicycle had been thrown into the lake. The facts in *Ryan's* case[1] were meagre, and a better illustration of the kind of case I am now discussing can be readily imagined.

[1] [1921] 2 I.R. 8. [2] (1921) 55 I.L.T.R. 80.

Suppose, for instance, that A proves that a valuable agricultural machine of his has been taken to pieces and the parts disposed of in places such as mine-shafts, deep lakes and arms of the sea from which they cannot be recovered. In such case the taking away of the parts may well be larceny, but as a matter of law I do not think it could be disputed that the dismantling of the machine was an act of malicious damage, or that the value of the missing parts could properly be taken into account in assessing compensation. In that type of case the paramount object is the destruction of the thing attacked, and the larceny is but incidental.

In *Getty v. Antrim County Council*,[1] Black L.J., sitting as Judge of Assize, held such dismantling to be the subject of compensation but was unable to find that the missing parts had been damaged or destroyed, as by being thrown into a river or bog hole, and therefore refused to give compensation in respect of their value. In *Kirby and anor. v. Kerry County Council*,[2] the applicants had their drapery shop in Tralee broken into by a number of persons who tossed about the stock, selecting certain articles of considerable value which they then carried away in lorries. Molony C.J. held, following *McDowell v. Corporation of Dublin*,[3] that the damage done to the premises and the stock therein was recoverable, but that the goods selected and taken away by the raiders could not be the subject of compensation. The Court of Appeal, in a very brief judgment delivered by Sir James Campbell L.C., held that compensation should be given for the goods stolen as the case was concluded by *Tyler's* case[4] and the *Congested Districts Board v. Mayo County Council*.[5] There was no finding in *Kirby's* case[2] that the larceny was the natural and direct consequence of the actual malicious injury to the premises, and for that reason, if for no other, it is hard to see why *Tyler's* case[4] was relied upon by the Court of Appeal. In *Leyburn v. Armagh County Council*,[6] the High Court of Appeal for Ireland had occasion to consider *Kirby's* case[2] and was clearly of opinion that it had been wrongly decided. The *Congested Districts Board's* case[5] was much more akin in its facts to the present appeal. There, an unlawful assembly of persons entered the applicant's wood on two successive nights and cut down the trees which they removed in carts. The wood was completely destroyed by the cutting down of the trees, and it was found as a fact by Moore J., the Judge of Assize, "that the persons who cut

[1] [1950] N.I. 114.
[2] [1921] 2 I.R. 388.
[3] [1903] 2 I.R. 541.
[4] [1921] 2 I.R. 8.
[5] (1920) 55 I.L.T.R. 4.
[6] [1922] 2 I.R. 58.

"down the applicant's trees were unlawfully assembled together, and "that they maliciously cut and damaged the applicant's growing "trees in the execution of their primary object, which was to steal the "timber, and that as a mixed question of law and fact the cutting "down and the larceny were all part of the same transaction." Moore J. then awarded as compensation a sum which included the value of the felled timber that had been taken away, and the Court of Appeal affirmed this decision, Sir James Campbell L.C. ending his judgment with these words[1]: "It is impossible, as it seems to me, "to contend that the damage to the owners in this case, consequent "upon the removal of the timber, was not sustained by means of the "acts of the unlawful assembly, as the precise means by which they "were enabled to abstract the timber was their criminal act in "demolishing the plantation. Holmes L.J. in *McDowell v. Corporation "of Dublin*[2] says that compensation is recoverable for every malicious "injury to property save the ordinary depredations of a thief, but I "can find no analogy to them in a case like the present, in which as "the result of a widespread and criminal organisation, bands of "marauders indulge in the wholesale demolition of plantations with "intent to inflict injury on the owners, even though the primary or "dominant purpose was to steal the trees. Where such malicious "injury is a necessary preliminary to the commission of the theft, or "where the theft is the natural and direct consequence, or the result "contemplated and intended, the party injured is, in my opinion, "entitled to compensation for all damages so sustained."

In my view it is quite clear on the facts of the present case that the larceny of the severed wire cannot be reckoned as a natural and probable consequence of the acts of malicious damage. It was the object for which those acts were perpetrated and to treat the loss due to the larceny as consequential would be, in my opinion, to fly in the face of the established facts and to justify an award in practically every case of larceny which necessitated some act of severance. It seems to me plain that the loss of the Postmaster-General arises from two distinct things, namely, the acts of malicious damage done in order to sever the wire from the overhead system, and, secondly, the larceny of the severed wire. No doubt, the larceny took place and had to take place after the acts of malicious damage, but to treat that as material is, as has been said on more than one occasion, "to "confound sequence with consequence."

It remains to consider whether the Postmaster-General's claim to recover the value of the stolen wire can be brought within the second

[1] (1920) 55 I.L.T.R. at 7. [2] [1903] 2 I.R. 541.

of the sub-categories to which I have referred, and supported on the ground that the taking away of the copper wire was really part and parcel of the act of injury or destruction. I think the short answer to this is that, on the findings, the object of those who caused the damage was the larceny of a valuable commodity and not the injury to the Postmaster-General's telephone system. This finding, however, does not suffice to distinguish the decision of the Court of Appeal in the *Congested Districts Board's* case[1]. In *Getty v. Antrim County Council*[2] Black L.J., speaking of this case, says: "As regards "the *Congested Districts Board's* case[1] (which on its facts is the case "most nearly resembling the one now before this court), the inclusion "in the compensation of the value of the timber removed could only "be supported if the theft of the timber could be said to be a con- "sequence of the cutting down of the trees. For my part I cannot see "how such a conclusion could be justified upon the facts of that "case." And then Black L.J. goes on to state his reasons for thinking that the majority of the High Court of Appeal for Ireland in *Leyburn's* case[3], regarded the *Congested Districts Board's* case[1] as wrongly decided. On that I respectfully agree with him.

In my opinion the *Congested Districts Board's* case[1] was undoubtedly wrongly decided. Its facts do not bring it anywhere near either of what I have described as sub-categories (i) and (ii). Had the felled trees been taken to an adjoining field and burned there the position might be different as respects sub-category (ii), but on the actual facts of that case the whole object of the attack was larceny, and the stealing cannot, on any fair view, be regarded as a subordinate incident or as part and parcel of an act of destruction.

In *Postmaster-General v. Down County Council*,[4] the facts are very shortly reported. Though not so stated in terms, I think it may be inferred that the purpose of the damage there was the larceny of the wire. The question of the value of the stolen wire is not mentioned. What is made clear is that if the severed wire had been left lying about it could not have been used in repairing the damage, and it may be that the decision was founded simply on the view that what had been severed had no value. But be that as it may, the case does nothing that I can see to uphold the reasoning of the decision in the *Congested Districts Board's* case[1], and without that there is nothing else in it to support the present claim.

[1] (1920) 55 I.L.T.R. 4.
[2] [1950] N.I. 114, 121.
[3] [1922] 2 I.R. 58.
[4] (1956) 90 I.L.T.R. 74.

For these reasons I am of opinion that the Postmaster-General's compensation should not include any sum in respect of the value of the stolen wire, and I would, accordingly, answer the second question submitted by saying that the amount of compensation recoverable is £9 10s. 10d.

BLACK L.J.: In this case the applicant's claim for compensation is based upon the provisions of section 135 of the Grand Jury (Ireland) Act, 1836 as extended by section 5(1) of the Local Government (Ireland) Act, 1898.

Section 135 of the Act of 1836 provided for the right of the injured party to recover compensation in cases of maliciously or wantonly setting fire to or burning or destroying certain specified types of property or of maliciously damaging, injuring or destroying certain other types. And section 5(1) of the Act of 1898 enacted that section 135 of the Act of 1836 should extend to the case of maliciously setting fire to destroying or injuring property of any description whether real or personal in like manner as they applied to the setting fire to injuring or destroying the particular descriptions of property specified in section 135. Section 5(1) of the Act of 1898 concluded, however, with a proviso that this Act should not extend the application of section 135 to any case except where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861.

As has been pointed out time and again in the Irish courts, both section 135 of the Act of 1836 and section 5(1) of the Act of 1898 provide for the payment of compensation only in case of the destruction of property or of injury or damage to it, but make no provision for compensation for property lost by theft. In cases where the Legislature has intended that compensation should be payable for loss by theft, it has done so expressly by clear and unequivocal provisions. Instances of such statutory provisions will be found referred to in the judgments in *Leyburn v. Armagh County Council.*[1] But there is no provision for compensation for loss by theft in section 135 of the Act of 1836 or section 5(1) of the Act of 1898.

The reason why I have dwelt upon what must seem so elementary a point is because of a suggestion thrown out during the argument in this court. If the miscreants who caused the damage which gave rise to the claim for compensation in the present case had been apprehended and prosecuted they would no doubt have been liable to conviction on an indictment under section 37 of the Malicious

[1] [1922] 2 I.R. 58.

Damage Act, 1861. This section provides that a person shall be liable to prosecution on indictment who shall unlawfully and maliciously cut, break, throw down, destroy, injure or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever being part of or being used or employed in or about any electric or magnetic telegraph or in the working thereof. It was suggested that the word "remove" in this section might have the effect of bringing the carrying away of the wire as well as the cutting of the wire within the scope of section 135 of the Act of 1836 and section 5(1) of the Act of 1898. But this clearly cannot be so. The terms of section 135 of the Act of 1836 and of section 5(1) of the Act of 1898 provide for the award of compensation only for the destruction of property or for injury or damage to it. The proviso to section 5(1) referring to the Malicious Damage Act, 1861, is a limiting proviso restricting the extension of section 135 to crimes punishable on indictment under the 1861 Act. It cannot have the opposite effect of widening that extension so as to provide for compensation in respect of any type of loss which might be made punishable under the Act of 1861 but which would not be comprehended under the words "setting fire to destroying or injuring" contained in the earlier part of section 5(1).

For a long time there was considerable difference of opinion as to whether compensation awarded for malicious injury should be confined to compensation for the actual physical injury done to the property itself or should include also compensation for loss which was the consequence of that injury. Eventually the Irish Court of Appeal took the latter view in *Noblett v. Leitrim County Council*[1] and the same view has been taken by this court in *Robinson v. Tyrone County Council*.[2] How then is this principle to be applied in a case such as the present where the property has not been absolutely destroyed by the wrongdoers but has been injured or damaged for the purpose of facilitating its theft? I endeavoured to collect the relevant authorities in my judgment in *Getty v. Antrim County Council*[3] and I need not now repeat at length what I said in that case. So far as I am aware the reported cases most nearly resembling the present case in their facts are *Congested Districts Board v. Mayo County Council*,[4] and *Connolly v. Minister for Finance*.[5] In the *Congested Districts Board's* case[4] a large number of men entered the

1 [1920] 2 I.R. 143.
2 [1952] N.I. 54.
3 [1950] N.I. 114.
4 (1920) 55 I.L.T.R. 4.
5 [1925] 2 I.R. 205.

applicant's plantation and cut down and carried away a considerable number of trees. The Judge of Assize found as a fact that the primary object of the persons who cut down the trees was to steal the timber. The Court of Appeal held that the compensation to which the applicants were entitled should be measured not merely by the injury to the plantation but by the value of the timber removed. In the later case, however, of *Leyburn v. Armagh County Council*,[1] which came on appeal before the High Court of Appeal in Ireland and in which a full court was assembled for the hearing, it appears from the judgments that the majority of the Judges were of opinion that the compensation in the *Congested Districts Board's* case[2] had been assessed on a wrong basis and that the value of the trees taken away ought not to have been included in the award. For my own part I would express my respectful concurrence with this view. In *Connolly's* case[3]—a decision of the Supreme Court of the Irish Free State—the facts closely resembled those of the *Congested Districts Board's* case[2]. In his judgment Kennedy C.J., with whom the other members of the court concurred, reiterated the opinion which he had previously expressed in *Kennedy v. Minister of Finance*[4] that the decision in the *Congested Districts Board's* case[2] was erroneous in ruling that compensation should be given in respect of the value of the trees taken away. This expression of opinion was, however, obiter inasmuch as in the meantime an Act had been passed by the Free State Legislature (No. 15 of 1923) enacting that the right to compensation under the Criminal Injuries Acts should be limited to compensation for the actual damage done to the property injured and should not extend to any compensation for any loss consequential to such actual damage.

In our courts, however, *Robinson's* case[5] has definitely determined that compensation under the Criminal Injuries code is not limited to compensation for the actual damage done to the property injured but may include compensation for loss consequential upon such damage. The net question, therefore, in the present case is whether the theft of the wire was consequential upon the wrongful cutting of the wire. In my opinion this question ought to be answered in the negative. In *Noblett's* case[6], the loss sustained by reason of the applicant being deprived of the use of his plough, pending its repair, was caused by and was a consequence of the physical damage to the

[1] [1922] 2 I.R. 58.
[2] (1920) 55 I.L.T.R. 4.
[3] [1925] 2 I.R. 205.
[4] [1925] 2 I.R. 195.
[5] [1952] N.I. 54.
[6] [1920] 2 I.R. 143.

plough. In *Robinson's* case[1] the two heads of consequential loss included in the award were due to and were a consequence of the physical damage to the applicant's taxi-cab. In the present case, however, though no doubt the larceny followed upon the cutting of the wire, I cannot see how the theft can be said to have been due to or caused by the cutting. To hold that the theft was a consequence of the malicious injury would, (in what Dodd J. in *Leyburn's* case[2] describes as O'Connor L.J's. apt phrase in *Tyler v. Cork County Council*[3]) be to confound sequence with consequence. And in coming to this conclusion I have the satisfaction that it appears to accord with the views of the majority of the members of the High Court of Appeal for Ireland in *Leyburn's* case[2].

I am, therefore, of opinion that the applicant is not entitled to recover the value of the wire stolen and, accordingly, the award of £142 10s. 10d. cannot stand. He is entitled, however, (a) to the diminution in value of the wire caused by the cutting, which on the figures set out in the case stated appears to amount only to £4 13s. 4d. and (b) to the amount of £4 17s. 6d. expended in connecting up strands of wire which were not stolen. I should have thought that he might also perhaps have claimed (as an item of damage consequent upon the malicious injury) for the cost of the actual work which would be involved in putting up new wire where the missing wire had stood. It would appear, however, from paragraph 4 of the case stated that the applicant did not include anything in respect of this in his claim, possibly I should imagine because it is considered unlikely that such replacement will ever be carried out. In any case the point was not argued before this court. The award to the applicant should accordingly be the sum of £9 10s. 10d.

MCVEIGH J. stated the facts and continued: The enactment with which we are concerned is section 5 of the Local Government (Ireland) Act, 1898, which extends the application of section 135 of the Grand Jury (Ireland) Act, 1836, to the case of maliciously setting fire to, destroying, or injuring property of any description, whether real or personal, in like manner as they apply to setting fire to, injuring or destroying the particular descriptions of property specified in the said section 135. The effect of this is to read into the said section 135 the words "property of any description whether real "or personal," provided that the setting fire to, injuring or destroying, is a crime punishable by indictment under the Malicious Damage

[1] [1952] N.I. 54.
[2] [1922] 2 I.R. 58.
[3] [1921] 2 I.R. 8.

Act, 1861: see Walker L.J. in *McDowell v. Dublin Corporation*,[1] and Kennedy C.J. in *Kennedy v. Minister of Finance*.[2] This particular kind of injury is such a crime by reason of the provisions of section 37 of the Act of 1861. The result therefore is that where an application for compensation is made under section 135 of the 1836 Act the court "may make a decree for such sum or sums of money as the "person or persons so injured ought to receive for such injury or "damage." Such compensation is to be "full compensation": see section 7(b) of the Criminal Injuries (Ireland) Act, 1920.

The case stated has found as a fact that the intention of the person who cut the wire was to commit an act of larceny, namely to steal the wire, and so this case raises again for debate the question of when and in what circumstances is it permissible to award compensation which will take into account the loss due to larceny. It was accepted by the applicant that "larceny simpliciter," as O'Connor M.R. calls it in *Tyler v. Cork County Council*,[3] is not a subject matter of compensation, or as it is put by Holmes L.J. in *McDowell v. Dublin Corporation*,[4] "Legislation has not yet gone so far as to "make the ratepayers answerable for the depredations of a thief." But it was contended that this was not a case of "larceny simpliciter."

It is quite impossible to reconcile all the various decisions under the Criminal Injuries Acts bearing on this question, and I do not attempt the task; I prefer to adopt the words of Kennedy C.J. in *Kennedy v. Minister of Finance*[5], where he says: "It would be a "formidable undertaking to examine, and an impossible one to "reconcile, the accumulated reports of decisions upon the interpre-"tation of some of the provisions of these Acts." Indeed it seems from his judgment in this case and in *Connolly v. Minister of Finance*[6] that he was of opinion that consequential loss was not a subject matter of compensation under the criminal injury code, even prior to 1923 when the Damage to Property (Compensation) Act was passed in the Irish Free State. It has, however, been decided by the Court of Appeal here in *Robinson v. Tyrone County Council*[7] that compensation can be awarded for consequential loss.

In *Congested Districts Board v. Mayo County Council*[8] compensation was awarded where the primary object was to steal the timber in a wood and where in pursuance of this object trees were maliciously cut and damaged. The basis stated for this decision is that the

1 [1903] 2 I.R. 541, 548.
2 [1925] 2 I.R. 195, 200.
3 [1921] 2 I.R. 8, 22.
[1903] 2 I.R. at 556.
5 [1925] 2 I.R. at 199.
6 [1925] 2 I.R. 205.
7 [1952] N.I. 54.
8 (1920) 55 I.L.T.R. 4.

cutting down and larceny were all part of the same act. If this decision was sound it would, I think, follow that compensation must be awarded in the present case. In the year 1925, i.e., four years later, a somewhat similar case came before the High Court in the Irish Free State and there a large number of trees in a wood were cut down and carried away. Compensation was awarded on the basis that the court was of opinion that the outrage was not primarily actuated by theft, but was one of many attempts to overthrow all law and all security for property in the country: *Lansdowne v. Kerry County Council.*[1] However, in the same year the case of *Connolly v. Minister of Finance*[2] came before the Supreme Court in the Irish Free State and there again a large number of growing trees were cut and carried away by a large number of local residents. In the lower court compensation was awarded to the applicants and this included compensation for the timber taken away. The Supreme Court, however, reversed the decision and ruled that the case of the *Congested Districts Board's* case[3] was erroneous in holding that compensation should be given in respect of the value of the trees taken away, and they refused to give compensation therefor. The decision in the *Congested Districts Board's* case[3] was also disapproved of in *Kenney's* case[4] and was considered and disapproved of in *Leyburn v. Armagh County Council.*[5] In the latter case a number of armed men entered a house and took away a gun, revolver, ammunition and other articles. No chattels other than two hats were injured or damaged. The owner applied for compensation for the articles stolen as well as for damage to the hats. This case was heard before the High Court of Appeal in Ireland and in the result compensation of £1 was awarded for the value of the two hats destroyed by being trampled on, but no compensation was allowed for the stolen articles as their larceny preceded the damage to the hats and was not even a sequence of any malicious injury. Sir John Ross C., after disapproving of the *Congested Districts Board's* case[3], says[6]: "I have treated "this case throughout as a case of pure larceny, and I am of opinion "that under the code no compensation can be awarded." He also thought the decision in *Tyler's* case[7] had been carried too far; and it is of importance to appreciate that the court in *Leyburn's* case[5] disapproved of the decision in *Kirby v. Kerry County Council*[8] where a number of persons burglariously entered a shop, tossed about the

1 [1925] 2 I.R. 87.
2 [1925] 2 I.R. 205.
3 (1920) 55 I.L.T.R. 4.
4 [1925] 2 I.R. 195.
5 [1922] 2 I.R. 58.
6 Ibid. at 64.
7 [1921] 2 I.R. 8.
8 [1921] 2 I.R. 388.

stock and took various articles. The Court of Appeal held that the applicants were entitled to compensation for damage to the shop and goods *and also* in respect of the stolen goods. In *Leyburn's* case[1], Maloney L.C.J. bases his decision as follows: "In the present case, "however, it cannot be contended that there was any connection "between the damage to the hats and the larceny of the weapons, or "that one was in any way consequent on the other. The persons "came for the purpose of getting the weapons, and in the pursuit "of their main object they, no doubt, injured the hats; but just as in "*McDowell's* case[2] compensation was given for the window broken "and not for the jewellery stolen, so here compensation can be given "for the hats destroyed, but not for the property stolen. *Tyler's* "case[3] is, however, relied on as supporting the opposite view. There "are some passages in the judgments which, in my opinion, went too "far, but I am still of opinion that the decision can be supported on "the facts of that particular case, and I adhere to what I said in my "judgment."

Andrews L.J. carefully reviews the various authorities bearing on the matter and attempts a reconciliation of the various conflicts in them; he says[4]: "With the principle of the right to include as con- "sequential damages the value of goods looted when their loss was "directly occasioned by and consequent upon the commission of mali- "cious injury, I express my respectful agreement." Later[5] he refers to section 1 of the Malicious Injury (Ireland) Act, 1853, under which the claim was brought, and goes on to say that comparisons of the relevant English and Irish Statutes "show clearly, in my opinion, "that larceny simpliciter is not the subject of compensation, though "when loss by theft flows naturally and immediately or directly from "damage or injury to property of the character mentioned in the "section, the value of such property so stolen may be included as "part of what is referred to in the section as 'all damages which shall " 'be so sustained.' The foundation of the claim must, however, be "by the clear words of the section, destruction of or damage or "injury to property, as distinguished from its loss."

In the same case Dodd J. says[6]: "In no sense here can the abstrac- "tion of the gun and other articles be traceable to any damages to "the hats. The theft of the articles seems to have been not even a "sequence. Apparently it preceded the damage to the hats. Each case "must be decided upon its own facts. But the damage must follow

[1] [1922] 2 I.R. at 66.
[2] [1903] 2 I.R. 541.
[3] [1921] 2 I.R. 8.
[4] [1922] 2 I.R. at 68.
[5] Ibid. 70.
[6] Ibid. 75.

"as a reasonable result of the injury to goods. In the case before us "there is no injury to goods, no destruction, no damage consequent "therefrom." This judge had already held in the case of *Taggart v. Belfast Corporation*[1] that although goods stolen are not the subject of compensation for malicious injuries to property, yet where a building is damaged by taking out and carrying away joists and beams, and in the proper repair of the building it would be necessary to restore the property stolen, the applicant can recover. He said also "but when the property claimed for is damaged by tearing out "and stealing part of it, the malicious injury does not become abated "by the extent of the larceny."

It seems to me that the learned judge considers that that case was correctly decided and, as I understand it, he sustains it on the principle enunciated in his judgment in *Leyburn's* case[2], namely, that compensation was awardable for the stolen joists and beams as part of the damage which followed as a "reasonable result of the "injury" to the house in the dismantling thereof. This however is one of those conflicts which I do not attempt to resolve.

It is of interest to note that in *Storan v. Limerick County Council*[3] the High Court in Eire awarded compensation under the Grand Jury (Ireland) Act, 1836, in respect of a number of calves killed maliciously although the calves were killed for the purpose of larceny of their skins which had been taken away. It was argued there that as the articles were not severable, the larceny of the skins was in fact the larceny of the calves and that, accordingly, no compensation should be awarded. The court however held that the applicant was entitled to compensation for the calves. This followed an earlier decision of *Shanley v. Limerick Corporation*[4] where apparently a roof had been stripped with a view to stealing the lead thereon. These cases are further instances of decisions where no clear guiding principles are set out and where the decisions are often prefaced with such words as "on the particular facts of this case," or "each case must be "decided on its own facts."

Nevertheless, such cases as the above raise interesting points for discussion, but I do not propose to develop the various implications which occur to one. They serve to show, however, the pertinence of Kennedy C.J's. words in *Kennedy v. Minister of Finance*[5]. In the conflict of authorities which exists it seems to me that some points

[1] (1917) 51 I.L.T.R. 160.
[2] [1922] 2 I.R. 58.
[3] [1939] Ir. Jur. R. 37.
[4] Unreported.
[5] [1925] 2 I.R. 195.

appear to have a balance of authority in their favour, for example:

(a) No compensation can be given in cases of what is referred to as "larceny simpliciter" (Andrews L.J. in *Leyburn's* case[1]), or "pure larceny" (Sir John Ross in *Leyburn's* case[1]), or "mere "larceny" (Kennedy C.J. in *Kennedy's* case[2]). Examples of this are the jewellery in the *McDowell* case[3], and the weapons in *Leyburn's* case[1].

(b) Compensation can be given for the value of stolen goods where such larceny was the natural and direct consequence of the malicious injury. Examples of this can be found in *Tyler's* case[4] and *McCutcheon's* case[5] and this principle is accepted by Andrews L.J. and Moloney L.C.J. in *McKnight v. Armagh County Council*[6] and by a majority of the judges in *Leyburn's* case[1].

None of the decisions referred to, except perhaps that in *Leyburn's* case[1] and *McKnight's* case[6], are binding on the court, but they are of high authority and I for my part am prepared to hold that the doctrine of compensation for larceny should not be extended beyond the limits indicated at (b) above. I should perhaps add that the binding effect of decisions of the High Court of Appeal for Ireland has not, so far as I am aware, yet been considered by the Court of Appeal here. During the course of the arguments I was attracted by the point that this was not really a case of awarding compensation for stolen goods, but was a case of determining the proper method of computing the compensation for malicious injury. The argument being that once the wires were cut the compensation required to restore this damage was such as would provide new pieces of wire (the old pieces, even if available, could not be used), and that such sum was the amount to which the applicant was prime facie entitled. This sum, it was argued, could only be diminished by the salvage value of the old wire, and only if such wire was available. Thus, so went the argument, as the old wire was not available due to no fault or lack of care on the part of the applicant, it would not be taken into account. I have discarded this argument because the cases to which I have referred, and in particular *Tyler's* case[4], *Leyburn's* case[1] and *Kennedy's* case[2], are all cases in which the courts were considering what was the true measure of compensation, and in indicating the principles to be followed in measuring such compensation they have decided, and I have accepted, that the value of stolen goods

[1] [1922] 2 I.R. 58.
[2] [1925] 2 I.R. 195.
[3] [1903] 2 I.R. 541.
[4] [1921] 2 I.R. 8.
[5] (1921) 55 I.L.T.R. 97.
[6] [1922] 2 I.R. 137.

cannot be included in the measure of compensation unless in the case of consequential loss of the type indicated in *Tyler's* case[1].

This is the view expressed by Black L.J. in *Getty v. Antrim County Council*,[2] where, after reviewing the relevant authorities, he enunciates two propositions which I have already set out above. But to the second proposition he adds the following words[3]:

"But the value of the goods so stolen (i.e., as a natural and direct "consequence of the malicious injury) can be included in the com- "pensation only in cases where the theft was a natural and direct "consequence of the malicious damage."

Although the facts of this case are not precisely similar to those in *Getty's* case[2], nevertheless if compensation was awarded here it would be difficult in principle to see how it could be refused in cases of the Getty type, and I do not consider that *Getty's* case[2] was wrong in principle.

Accordingly, I would answer the second question in the case stated "£9 10s. 10d." and vary the award accordingly.

*Appeal allowed.*

Solicitor for the Postmaster-General: *Babington & Croasdaile.*
Solicitor for the Rural District Council: *Stuart C. Ross & Co.*

S.M.M.

1 [1921] 2 I.R. 8.
2 [1950] N.I. 114.
3 Ibid. at 121.

## IN RE FRAMPTON[1].

*Probate—Appointment of foreign bank as executor—Whether bank entitled to a grant as a trust corporation—Probate and Letters of Administration Act (Northern Ireland)*, 1933 (23 & 24 *Geo.* 5, *c.* 16), *ss.* 1, 4—*Administration of Estates Act (Northern Ireland)*, 1955 (3 & 4 *Eliz.* 2, *c.* 24), *s.* 28(2).

The power of a foreign joint stock banking company to undertake trust business without territorial limitation, though conferred by the enactment of a foreign State, will be recognised in Northern Ireland for the purpose of obtaining a grant of probate as a trust corporation under the provisions of the Probate and Letters of Administration Act (Northern Ireland), 1933, as amended by section 28(2) of the Administration of Estates Act (Northern Ireland), 1955.

Reference by Memorandum from the Chief Probate Registrar.

The testatrix died on August 13, 1956, having by her last will, dated December 22, 1952, appointed the Governor and Company of the Bank of Ireland, the Bank of Ireland Trustee Company, and her sister to be the executors of the will. At the time of her death the testatrix was domiciled in Northern Ireland, and an application in the Principal Probate Registry for probate of the will was submitted on October 29, 1956, on behalf of the executors named in the will. A grant issued to the two last named executors, reserving the rights of the Bank of Ireland, it being a foreign bank having its head office in Dublin, but with offices in Northern Ireland. By a memorandum dated December 12, 1956, the Chief Probate Registrar referred to the High Court the question whether the Bank was a trust corporation, and, if so, whether a grant of probate should be made to it.

*Patton Q.C.* and *O'Donnell* for the Bank of Ireland. The question of whether or not the Bank is a trust corporation depends on the construction of section 4 of the Probate and Letters of Administration Act (Northern Ireland), 1933, as amended by section 28(2) of the Administration of Estates Act (Northern Ireland), 1955. The latter section extended the definition of "trust corporation" contained in the 1933 Act to include "any joint stock banking company "having a place of business in Northern Ireland and empowered by "its constitution to undertake trust business." It is therefore no longer necessary that the Bank should have been constituted under the law of the United Kingdom, but only that it be a joint stock company, and that it has power to undertake trust business.

The difference between regulated and joint stock companies is that a regulated company has no capital, strictly speaking, and no

[1] In the Queen's Bench Division (Probate) before Lord MacDermott L.C.J.: Jan. 25, Feb. 8, 1956.

stock. Membership gave a right to trade in a particular place: see Holdsworth, History of English Law, vol. viii. The Charter of the Bank does not specifically describe it as a joint stock company, but it refers to the "common stock" of the Company, and that the Bank of Ireland was regarded as being a joint stock company is clear from section 3 of the Banking Companies (Shares) Act, 1867. *Walburn v. Ingilby*[1] is a case which illustrates the position of, and the terms used in connection with, joint stock companies. The phrase "joint stock "company" in the 1955 Act is used descriptively to get away from the statutory definition of "company" and to include companies which are not incorporated.

The Bank has power to undertake trust business by virtue of section 5 of the Bank of Ireland Act, 1929, passed by the Legislature of the Irish Free State. That power is a general one and its exercise is not confined territorially. It is common business practice to recognise the powers of foreign companies provided that their exercise is legal by local law. The effect of the 1955 Act is to recognise and give effect in Northern Ireland to the power conferred by the 1929 Irish Free State Act. If the 1929 Act prohibited the Bank from undertaking trust business in this jurisdiction the matter would be quite different, because in order to come within section 28(2) of the 1955 Act, the Bank must first show that it has power under its own constitution. It is submitted that the whole purpose of the definition of "trust corporation" by section 28(2) was to include such banking companies as find themselves in the position of the Bank in the present instance.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J. stated the facts and continued: The question raised by the Chief Probate Registrar for the determination of the court is whether a grant should be made to the Bank of Ireland (hereinafter referred to as "the Bank"). In the circumstances, this depends on whether the Bank is a trust corporation within the definition contained in section 4(1) of the Probates and Letters of Administration Act (Northern Ireland), 1933, as extended by section 28(2) of the Administration of Estates Act (Northern Ireland), 1955. It is clear that the Bank was not a trust corporation before the Act of 1955, and the net point for decision is whether it now comes within the extended meaning given to the words "trust corporation" by the first part of section 28(2) of the last mentioned Act, which provides that the definition in the Act of 1933 "shall extend so as to

[1] (1833) 1 My. & K. 61.

"include within that expression any joint stock banking company "having a place of business in Northern Ireland and empowered by "its constitution to undertake trust business...."

The Bank has its head office in Dublin, and Mr. Hugh William Kennedy, the Governor of the Bank, has made an affidavit which sets out, inter alia, the nature of the Bank's constitution and refers to the Charter and Acts of Parliament providing for its incorporation and powers. Among the Acts referred to is the Bank of Ireland Act, 1929, which was passed by the Legislature of the Irish Free State and which, by section 5, paragraphs (k) and (u), empowers the Bank to act as executors, administrators and trustees and to do so either within or without the State which is now the Irish Republic.

Having considered the constitution of the Bank and Mr. Patton's submissions thereon I have no difficulty in holding that the Bank comes within the phrase "any joint stock banking company." Its juristic character is that of a joint stock company and when one contrasts section 28(2) with the terms of section 4(1) of the Act of 1933 it is, I think, impossible to construe the enlarging provisions of section 28(2) so as to restrict them to Northern Ireland or United Kingdom banking companies. The further requirement of "a place "of business in Northern Ireland" is clearly satisfied, and it only remains to consider whether the Bank is "empowered by its constitu- "tion to undertake trust business." For the meaning of "trust busi- "ness" one must go back to section 4(1) of the Act of 1933 where it is defined as "....the business of acting as trustee under wills and "settlements and as executor and administrator."

In my opinion this requirement of section 28(2) must be construed as referring to a power to undertake trust business in Northern Ireland. The whole purpose of section 28(2) is to widen the term "trust corporation" in its application to Northern Ireland and it would be more than strange if the extended definition could operate to confer a capacity to undertake trust business upon a company which had no power by virtue of its constitution to do that sort of business *in this jurisdiction*. If, for example, the Act of 1929 had only authorised the Bank to undertake trust business in the Irish Free State, I should find difficulty in holding that the Bank came within section 28(2).

But has the Act of 1929, purporting as it does to confer this power without any territorial limitation, an effect which enables a different view to be taken? No doubt it is true to say that its direct or immediate operation is limited to the Republic and that it cannot

of its own force apply to Northern Ireland. As I see the situation, however, that is only a part of it. As a matter of comity between friendly states, and subject to such local laws as may produce a different result, a foreign corporation is allowed to carry on business in this jurisdiction on the strength of the powers conferred by its home state, which will usually be the state where it is incorporated. The foreign corporation, so to speak, carries its powers with it and can exercise them elsewhere in the absence of provision to the contrary. As a general proposition that seems to have been accepted for many years: see *Bateman v. Service*[1], and *De Beers Consolidated Mines, Ltd. v. Howe*[2] per Mathew L.J.

In the present case I know of nothing to obstruct this recognition of the powers of the Bank as conferred by the provisions of the Act of 1929 to which I have drawn attention. If I am right in my reading of it, section 28(2) of the Act of 1955, far from doing that, is intended to facilitate the recognition of the relevant powers of the Bank and other banking companies in the same position.

For these reasons I hold that the Bank is a trust corporation for the purpose of section 1 of the Act of 1933 and is, accordingly, qualified to receive a grant. This section is permissive and gives the court a discretion; but if the Bank wants a grant in the present case I see no reason why it should not get it.

*Direction accordingly.*

Solicitor for the Bank of Ireland: *P. J. McGarvey.*

S.M.M.

1 (1881) 6 App. Cas. 386. 2 [1905] 2 K.B. 612, 641.

## McCLELLAND, Appellant; NORTHERN IRELAND GENERAL HEALTH SERVICES BOARD, Respondent[1].

*Master and Servant—Contract of service—Implied term—Duration of service—Officer of statutory board—Advertisement inviting applications for post—Employment expressed to be "permanent and pensionable"—Contract providing for termination in certain contingencies—Right to terminate employment in circumstances not specified.*

In 1948 the Northern Ireland General Health Services Board advertised, inviting applications for posts as senior clerks, the appointments being expressed to be "permanent and pensionable." The appellant, having applied, was appointed and was shown the terms and conditions of service. These contained a clause providing for the dismissal of officers for "gross mis-"conduct" or if they proved "inefficient and unfit to merit continued em-"ployment." There was also a provision for dismissal on failure to take or to honour the oath of allegiance and another related to termination of employment by reason of permanent ill-health or infirmity. There was no provision for dismissal in other circumstances. It was, however, provided that "permanent officers," who wished to terminate their employment with the board, must give one month's notice. In 1953 the board purported to terminate the appellant's employment on six months' notice on the ground of redundancy of staff and without any suggestion of misconduct or inefficiency on her part:—

*Held* (Lord Tucker and Lord Keith of Avonholm dissenting), that on the true construction of the terms and conditions of service the express powers of the board to dismiss an officer were comprehensive and exhaustive and no further power could be implied. Accordingly, her service had not been validly terminated.

Decision of the Court of Appeal in Northern Ireland [1956] N.I. 127 reversed.

APPEAL from the Court of Appeal in Northern Ireland.

This was an appeal from an order of the Court of Appeal in Northern Ireland of March 29, 1956, affirming an order of the Chancery Division in Northern Ireland of May 9, 1955, whereby it was declared and adjudged that question No. 3 on the originating summons in this matter, that is to say, whether, in the events which had happened the engagement of Elizabeth McClelland, the plaintiff and appellant, as a senior clerk with the Northern Ireland General Health Services Board, the defendant and respondent, had been validly terminated, was answered in the affirmative.

[1] In the House of Lords: Present Lord Oaksey, Lord Goddard, Lord Tucker, Lord Keith of Avonholm and Lord Evershed; Feb. 18, 19, 20; April 4, 1957.

The report of this case is, by the kind permission of the Incorporated Council of Law Reporting for England and Wales, taken from the report in volume 1 of the Weekly Law Reports, 1957.

The facts are fully set out in the opinions of Lord Oaksey and Lord Tucker.

*E. W. Jones Q.C.* and *C. B. Shaw* (both of the Bar of Northern Ireland) for the appellant.

*W. F. Patton Q.C.* and *John MacDermott* (both of the Bar of Northern Ireland) for the respondent board.

The following authorities, in addition to those referred to in their Lordships' opinions, were cited in argument: *Henriksen v. Grafton Hotel Ltd.*[1]; *Sampson's Executors v. Nottinghamshire County Council*[2]; *Elderton v. Emmens*[3]; *Tyers v. Barmera Packing Co. Ltd.*[4]; *Beaufort v. Crawshay*[5]; *Ward v. Barclay Perkins & Co. Ltd.*[6]; *In re Berker Sportcraft Ltd.'s Agreements*[7]; *North Stafford Steel, Iron & Coal Co. (Burslem) Ltd. v. Ward*[8]; *Jones v. Llanrwst Urban District Council*[9]; *Ottoman Bank v. Chakarian*[10]; *Martin-Baker Aircraft Co. Ltd. v. Canadian Flight Equipment Ltd.*[11]; *Jacksonv. Hayes, Candy & Co. Ltd.*[12].

Their Lordships took time for consideration.

April 4. Lord Oaksey. My Lords, this is an appeal from an order of the Court of Appeal for Northern Ireland affirming an order of the Chancery Division in Northern Ireland declaring on an originating summons that the engagement of the appellant as a senior clerk with the respondent had been validly terminated.

The appellant had been and was employed as a clerk in the service of the Northern Ireland Hospitals Authority and on June 21, 1948, she read an advertisement in the Belfast Evening Telegraph which invited applications for posts on the general staff of the Northern Ireland General Health Services Board and stated, in reference to senior clerks: "Subject to a probationary period appointments will "be permanent and pensionable. Salaries and wages will be subject "to deductions under a superannuation scheme." The appellant accordingly applied for a post, and on July 29, 1948, after an interview, was selected for appointment as a senior clerk at a salary of £300 per annum rising to £400. In the month of August, 1948, she was shown a copy of the conditions of service, which were called

1 [1942] 2 K.B. 184; 58 T.L.R. 271; [1942] 1 All E.R. 678.
2 [1949] 2 K.B. 439; 65 T.L.R. 376; [1949] 1 All E.R. 1051.
3 (1847) 4 C.B. 479.
4 [1930] S.A.S.R. 123.
5 (1866) L.R. 1 C.P. 699.
6 [1939] 1 All E.R. 287.
7 (1947) 177 L.T. 420.
8 (1868) L.R. 3 Ex. 172.
9 [1911] 1 Ch. 393; 27 T.L.R. 133
10 [1930] A.C. 277.
11 [1955] 2 Q.B. 556; [1955] 3 W.L.R. 212; [1955] 2 All E.R. 722.
12 (1938) 160 L.T. 112; [1938] 4 All E.R. 587.

"the September conditions," and it is convenient to set out clauses 4, 9 and 12 of these conditions:

"4. *Probation:*

"The appointment of every new entrant shall be subject to a term "of probation of six months. At the end of the probationary period, subject to a satisfactory report by the secretary, the appointment "will be confirmed. If the board think fit, the period of probation "may be extended. Unless a satisfactory report is received from the "secretary at the end of an officer's period of probation or extended "period of probation, the board may dismiss him by giving him one "month's notice of their intention.

"9. *Oath of Allegiance:*

"Every person employed will be required to take the oath of "allegiance as prescribed in regulations made under section 80 of "the Health Services Act (Northern Ireland), 1948. Any failure to "comply with this requirement or any failure to honour such oath "if taken will involve immediate dismissal of the person concerned "from the service of the board.

"12. *Dismissal and Reduction in Rank, and termination of employ-"ment otherwise:*

"The board may dismiss any officer for gross misconduct and may "dismiss any officer who is proved to their satisfaction to be in-"efficient and unfit to merit continued employment. Except where "an officer has been guilty of gross misconduct, the board shall give "at least one month's notice of their intention to exercise their "powers of dismissal under this rule. As an alternative to dismissal "the board may order the reduction in rank of an officer who is "found by them to be unfit to discharge the duties of the grade in "which he has been employed. One month's notice in writing shall "be given by all permanent officers who wish to terminate their "employment with the board."

Having served a probationary period of six months on February 16, 1949, the appellant was confirmed in her post as a senior clerk.

On August 14, 1950, the respondent inserted the following provision in the said conditions: "Female officers will on marriage be "required to tender their resignations to the board." The appellant made inquiries whether this condition was to be applied to officers already on the staff, and, being advised and being under the impression that it did not apply to them, got married in March, 1951.

On May, 29, 1953, the respondent wrote to the appellant terminating her employment on June 30, 1953, on the ground of redundancy of staff. After further correspondence between the respondent and the appellant's solicitor the respondent's establishment officer wrote, on June 25, 1953, saying: "The committee agreed that, in order to "enable you to qualify for superannuation benefits, the notice of "dismissal dated May 29 be withdrawn and that your services be "retained until December 31, 1953."

On November 30, 1953, the appellant received the following letter:

"Northern Ireland General Health Services Board,
"9, Upper Queen Street,
"Belfast.

"November 30, 1953.

"Ref. No. G.H.S.

"Dear Madam,

"As you are aware, the board some time ago considered the "situation created by the refusal of some married women on their "staff establishment to accept as applicable to themselves the requirement in the terms of service that female members of the staff should "tender their resignations on marriage. To enable the position to be "clarified, the board extended the employment of the persons concerned to December 31, 1953.

"In order that there may be no further dubiety as to the applicability of the terms of service, the board, acting on legal advice, "now intend to serve on each married woman on their establishment "six months' notice of dismissal expiring on the anniversary date of "her employment. Notice will, therefore, in due course be served on "you expiring on August 16, 1954, the anniversary date of your "appointment, and employment with the board will continue to be "open to you from December 31, 1953, to that date.

"Yours faithfully,

"(Signed) W. BIRNIE,
"for Secretary.

"Mrs. E. M. McClelland,
"Dental Branch,
"9, Upper Queen Street,
"Belfast."

The appellant thereupon commenced these proceedings by originating summons in the Chancery Division, and on May 9, 1955, Curran J. gave judgment in favour of the respondent, holding that the appellant was a civil servant holding office during the pleasure of the Crown and that her dismissal was accordingly valid. This view of the case had not been argued and it has at no time been supported by the respondent.

On appeal to the Court of Appeal the appeal was dismissed by Lord MacDermott C.J. and Black L.J., Porter L.J. dissenting.

Lord MacDermott C.J. and Black L.J. were of opinion that the case depended on the September conditions and that clause 12 did not preclude the board from terminating the employment of a permanent officer by reasonable notice. In arriving at this conclusion the Lord Chief Justice relied upon the fact that there was, in his view, no express provision or plain implication that the right to give a reasonable notice was taken away, that the heading of clause 12 was insufficient to make the clause comprehensive, that the fact that the clause empowered a permanent officer to give one month's notice signified that the office was not of a permanent nature, and that many of the conditions applied to temporary officers.

Black L.J. was of opinion that clause 12 of the September conditions, since it only dealt with certain limited and specified cases for dismissal, did not exclude the right to give reasonable notice. Porter L.J., who dissented, held that the meaning of the word "permanent" was supplemented and explained by the word "pensionable," and after citing the words of Scrutton L.J. in *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.*[1] he held that condition 12 was an express provision for the rights of the parties to determine the contract and that it was not necessary to imply any further right to give the transaction that efficacy that both parties must have intended it to have.

In my opinion, Porter L.J. was right and the appeal ought to be allowed.

I do not think it is necessary to discuss the cases which were cited in the court below, for the question depends upon the construction of this contract. No doubt the word "permanent" must be construed in the light of its context but no case has been cited in which the word "permanent" has been linked with the word "pensionable" and in which the termination of the contract on the one side and on the other is expressly defined.

[1] [1918] 1 K.B. 592, 605.

Counsel for the respondent in your Lordships' House based their arguments upon the fact that in the case of a general hiring for an indefinite time a master is entitled to give his servant a reasonable notice and contended that the contract in question was a contract of master and servant for a general hiring. It is, no doubt, true that a general hiring without more is terminable on reasonable notice, but, in my opinion, the contract in question was not a simple contract of general hiring for an indefinite time. It began by an offer of a permanent and pensionable post. That offer did not, of course, conclude a contract but it cannot be ignored in the construction of the contract which was then concluded. That contract incorporated provisions under which the appellant, after a period of probation, was entitled to an annual pension on a contributory basis on completing ten years' service in circumstances of ill health or on attaining the age of sixty, a short service gratuity for five years and other pension rights and allowances for sickness. Moreover, the contract was expressly subject to the September conditions.

The clauses I have set out all contain express powers of termination and, in my opinion, there is no ground for suggesting that it is necessary to imply a further power to terminate the contract in order to give the contract the efficacy which the parties must have intended it to have. With the greatest respect to the Court of Appeal in Northern Ireland and those of your Lordships who take a different view, I think, on the contrary, that to offer an officer a permanent and pensionable post on such terms and then to claim the right to give him notice which will deprive him of all the pension and other rights offered by the express terms of the contract, not only is not a right which the parties must have intended the master to have, but is one which no reasonable person could have contemplated he would claim.

For these reasons I move your Lordships that this appeal be allowed.

Lord Goddard: My Lords, the respondents are a statutory corporation established under the Health Services Act (Northern Ireland), 1948, and the number, remuneration and conditions of service of their staff are subject to the approval of the Ministry of Health and Local Government. The board are apparently required to recruit staff by advertisement and on June 21, 1948, they advertised in the Belfast Evening Telegraph inviting applications for posts on their staff. The advertisement set out the qualifications required and the

salary offered and stated that: "Subject to a probationary period "appointments will be permanent and pensionable. Salaries and "wages will be subject to deductions under a superannuation "scheme." The appellant, who at that time was a clerk in the service of the Northern Ireland Hospital Authority, applied for a position as senior clerk and, following an interview with the board, she was informed by letter dated July 29, 1948, that she had been selected for appointment. She accepted the appointment, resigned from her employment with the Hospitals Authority, and started work under the respondents on August 16. It is clear, in my opinion, and neither party seeks to contend otherwise, that the service on which she then entered was for the probationary period referred to in the advertisement and during that period, indeed quite soon after August 16, she was given a document containing the full conditions of service, which she agrees she accepted as the conditions of her employment. The probationary period ended in February, 1949, and her appointment was then confirmed. Until it was confirmed it would have been, in my opinion, permissible for the board to have terminated the employment at any rate on one month's notice. The object of a probationary period is to ascertain if the candidate is likely to prove efficient and, as will be seen below, a month's notice can be given for inefficiency. In 1954 the board sought to determine the appellant's engagement, and after some discussion and correspondence into which it is unnecessary to enter she was finally given six months' notice expiring on August 16 of that year. It is not disputed that if the board had the right to determine the employment the notice was adequate. The question on which there has been a difference of opinion in the Court of Appeal is whether the board had the right to determine the employment. The question, to my mind, depends on the true construction of clause 12 of the conditions of employment. It is entituled: "Dismissal and reduction in rank, and termina- "tion of employment otherwise." This title indicates, in my opinion, that the clause is intended to be comprehensive. It provides that an officer may be dismissed for gross misconduct and if found to be inefficient and unfit to merit continued employment. It provides that except where the officer has been guilty of gross misconduct the board shall give at least one month's notice of their intention to exercise their powers of dismissal under the rule and that they may, instead of dismissing, order a reduction in rank of the officer found to be unfit to discharge the duties of the grade in which he was employed. The clause then provides that an officer may terminate his employment by giving one month's notice. The only other pro-

vision in the conditions with regard to dismissal is one providing that a failure to take the oath of allegiance or failure to honour the oath, if taken, will involve instant dismissal. Officers employed by the board are entitled to the benefits and liable to contribute towards the Health Services superannuation scheme established by the Ministry of Health and Local Government. This scheme provides for a pension to an officer of ten years' service who becomes incapable on account of ill health or has attained the age of 60. If he has attained the age of 60 and has completed five years' service he may receive a lump sum retiring allowance if he retires owing to ill health. There is also a provision for repayment of contributions to an officer who retires but does not become entitled to a pension.

That an advertisement offers permanent employment does not, in my opinion, mean thereby that employment for life is offered. It is an offer, I think, of general as distinct from merely temporary employment, that is, that the person employed would be on the general staff with an expectation that apart from misconduct or inability to perform the duties of his office the employment would continue for an indefinite period. But apart from a special condition, in my opinion, a general employment is ways liable to be determined by reasonable notice. Nor do I think that because a person is offered pensionable employment the employer thereby necessarily engages to retain the employee in his service long enough to enable him to earn a pension. But, when one comes to consider the express condition in this case relating to dismissal, in my opinion, the fact that the offer was of a permanent and pensionable employment does assist in the construction to be placed on that condition. As I have said, the clause appears to be comprehensive in its terms. It provides, no doubt unnecessarily, for dismissal without notice for gross misconduct, but also for the length of notice to be given in a case of inefficiency and for the notice the officer may give to terminate his employment. If it was intended that the board should have a similar right to determine the engagement it is strange that it does not provide what notice is to be given, and this omission seems to me the more significant when it is remembered that the conditions apply to officers of various degrees or standing and varying rates of salary. Senior executives would ordinarily be entitled to longer notice than a typist or machine operator, and, had it been the intention that all these offices should be determined at the pleasure of the board, I should have expected that, considering their number and variety, the length of notice to be given and received would be stated in the

conditions. Remembering the terms of the advertisement in conjunction with the provisions of condition 12, I think the fair conclusion is that the board offered and the appellant accepted employment on terms as secure as is in fact enjoyed by civil servants. Although a civil servant, as is well known, is employed at the pleasure of the Crown and can be dismissed at any moment, in fact once he has qualified by examination or probation and is taken on the establishment he is secure in his employment till he reaches the retiring age, apart, of course, from misconduct or complete inefficiency. I think, on the true construction of condition 12, the board debarred themselves from giving notice apart from the reasons specified therein, and I would therefore allow the appeal.

LORD TUCKER: My Lords, on August 16, 1948, the appellant started to work for the respondent board as a senior clerk at a salary of £300 per annum rising by annual increments of £12 to £396 and a further single increment of £4 to £400. She had been selected for this post as a result of an interview following upon an advertisement inserted by the board in the press inviting applications for senior clerkships and other posts which, it was stated, would, "subject to a probationary period, be permanent and pensionable." This probationary period came to an end on February 16, 1949, when she was confirmed in her post as senior clerk and became an established officer. In the meantime, on September 3, 1948, the Ministry of Health and Local Government had approved a document which has been referred to as "the September conditions" and which had been prepared by the respondent board, setting out the conditions of employment of its staff. The appellant was handed a copy of this document and it is common ground that her continued employment at the end of the probationary period was on the basis of her acceptance of these conditions so far as applicable to her case.

My Lords, unless there is to be found in this document something which clearly confers upon the appellant an appointment for life subject only to determination as therein expressly provided, it would, I think, be impossible to suppose that the use of the words "permanent and pensionable" in this advertisement indicated anything more than that the posts available were on the regular established staff and were subject to the terms of a pension scheme. In this context this is, I think, their natural meaning, and, judging from the appellant's letter of June 23, 1948, in which she states: "I was "appointed to the permanent staff of the Orange and Protestant "Approved Society, 12 Donegall Square West, Belfast, on November

"27, 1939, and continued with them until January 13, 1948, when I "was transferred to Stormont under the Ministry of Labour and "National Insurance," there can, I think, be no doubt that this is the sense in which the appellant understood the word "permanent." It is, in my view, impossible to hold that these words conferred upon her a contractual right to a freehold tenure of the post of senior clerk or did anything more than indicate that the posts available would have the degree of security of tenure which attaches to the regular, as distinct from the purely temporary, staff and would qualify for pension rights and benefits and be subject to the obligation to contribute as laid down in the scheme, which scheme, it is to be observed, is not one to which the board is in any way a party. It is a scheme which is imposed upon the board and its officers by S.R. & O., N.I., 1948, No. 161, made by the Ministry of Health and Local Government under section 61 of the Health Services Act (Northern Ireland), 1948. The advertisement, in my view, formed no part of the eventual contract between the parties, but there is, I think, no ground for holding that the appellant could reasonably have supposed that the final terms of her contract at the conclusion of the probationary period would give her the legal right to a life appointment or that the board could for one moment have contemplated such a result.

It may well be, however, that the language used in the September conditions on its proper construction compels your Lordships to hold that this document, contrary to any expectation which the appellant could reasonably have entertained, has in fact conferred upon her a status of irremovability.

This is the angle from which I approach the construction of clause 12 of the conditions upon which the result of this appeal depends. Has it expressly or by necessary implication deprived the board of the right to determine by reasonable notice the contracts of service of its "permanent" (i.e., regular and established) staff, a right which attaches to all contracts of service of indeterminate duration in the absence of custom or provision expressed or implied to the contrary?

Clause 12 is headed: "Dismissal and Reduction in Rank, and ter- "mination of employment otherwise." and reads as follows: "The "board may dismiss any officer who is proved to their satisfaction "to be inefficient and unfit to merit continued employment. Except "where an officer has been guilty of gross misconduct, the board "shall give at least one month's notice of their intention to exercise

"their powers of dismissal under this rule. As an alternative to dis-
"missal, the board may order the reduction in rank of an officer
"who is found by them to be unfit to discharge the duties of the
"grade in which he has been employed. One month's notice in
"writing shall be given by all permanent officers who wish to ter-
"minate their employment with the board."

Three other clauses must also be referred to. Clause 4, which deals with the probationary period of six months, contains the following: "Unless a satisfactory report is received from the secretary at the "end of an officer's period of probation or extended period of pro- "bation, the board may dismiss him by giving one month's notice "of their intention." Clause 9 requires every person employed to take the oath of allegiance and proceeds: "Any failure to comply "with this requirement or any failure to honour such oath if taken "will involve immediate dismissal of the person concerned from the "service of the board." Clause 19 deals with sickness payments and by sub-clause (3) (*h*) provides: "The provisions of this scheme shall "cease to apply to an officer on the termination of his employment "whether by reason of permanent ill-health or infirmity of mind or "body or by reason of age, but without prejudice to the right of an "officer whose employment is terminated by reason of permanent "ill-health or infirmity to receive the period of notice provided by "his contract of service."

My Lords, a contract for employment for life is rare; such a contract covering a class of persons which may include young clerks and typists must be rarer still; and one which gives such security to such a class of persons, but enables them to terminate their employment on a month's notice, must be almost unique. I would therefore expect to find express language in any contract intended to have this result, and would require compelling words before I would feel justified in construing a contract as producing such a result by implication or the application of some rule of construction.

It is to be noted in the first place that clause 12 does not deal comprehensively with all cases of dismissal: cf. clauses 4 and 9 referred to above. Secondly, the reference to the notice to be given by permanent officers wishing to terminate their employment is the only instance of the use of the word "permanent" with reference to staff tenure anywhere in the document. Clause 12 does not seem to me inconsistent with an employment of indeterminate duration subject to an express concession in favour of the staff of a standard period of notice where they desire to terminate their employment,

and express provision recognising the common law right of immediate dismissal for gross misconduct coupled with a special fixed period in the case of unfitness. This leaves the board with their right to terminate by reasonable notice, which will vary with the different grades or status of their officers and the length of which is accordingly not specified. The expressio unius rule of construction does not, I feel, compel a different construction since the clause is not exhaustive and, in any event, is concerned with defining the length of notice required, in the absence of gross misconduct, rather than in prescribing the only circumstances in which the employment can be terminated.

My Lords, having regard to the fact that there is a difference of opinion in your Lordships' House on this matter, I have thought it right to set out my reasons for thinking this appeal should be dismissed. Otherwise I should have contented myself with expressing my complete agreement with the judgment of the Lord Chief Justice of Northern Ireland. In arriving at this conclusion, which is dependent upon the construction of clause 12 in the special context of this case, I can derive no assistance from any of the authorities which were referred to in argument.

Lord Keith of Avonholm: My Lords, this case raises a question of general importance which may affect not only persons in the employment of the respondent board in a like case with the appellant, but may well have repercussions on the powers of public bodies or authorities which do not rank as branches of the Civil Service to terminate the employment of their servants.

A point raised in the case is whether the advertisement, in response to which the appellant applied for service with the respondent board, forms part of her contract of service. The point, in my opinion, is immaterial. I incline to the view that it was merely a notice of the kind of employment for which applications were invited, with a note of the salary scales for the respective classes of posts to be filled and with an indication of the qualifications for appointment and conditions to be observed by applicants. But it is not disputed that the appellant was in fact appointed to a permanent and pensionable post on the board's staff, whatever that may mean, and the statement or representation in the advertisement has accordingly been fulfilled. The only question is what results flow from this appointment.

A mere statement that a person holds a permanent and pensionable post is very imprecise. It contains no indication of the degree

of permanence or the nature and conditions of the pension. It is to be noticed that, by letter from the board's secretary, dated July 29, 1948, the appellant was informed that she had been selected as senior clerk on the board's staff at a certain salary scale and was asked to say whether she was finally prepared to accept the appointment. She did accept and took up her duties on August 16, 1948. She came at once under the pension scheme set up by the Health Services (Superannuation) Regulations (Northern Ireland), 1948 (S.R. & O., N.I., 1948, No. 161), and dated June 24, 1948. This was not a pension scheme of the board but a government pension scheme made under the Health Services Act (Northern Ireland), 1948, which applied to the appellant as an officer of the board, an employing authority under the regulations. The statement in the advertisement that the appellant's appointment would be pensionable was thus satisfied. The appellant, of course, would have to comply with the conditions of the pension scheme, and under the scheme the board were entitled to deduct her contributions from her salary and pay them over to the Ministry; but the board did not guarantee her any pension, or control the conditions of its payment in any way, nor were they, in my opinion, bound to do so by any contract made with her.

I turn, then, to the question of the permanence of her appointment. When the appellant took up her appointment on August 16, 1948, there were no terms and conditions of service in existence. But section 56 (1) of the Health Services Act (Northern Ireland), 1948, required the board to determine the number, qualifications, remuneration and conditions of service of officers of the board. On August 18, 1948, the Finance and General Purposes Committee of the board recommended certain terms and conditions of service which were adopted by the board on August 25 and approved by the Ministry on September 3, 1948. From August 16 to September 3 neither the board nor the appellant were under any conditions other than those specified in the board's letter of July 29, and I think that Mr. Patton was right in his contention for the respondent board that during that period and subject to proving her fitness for the post during a probationary period of service the appellant held her post under a contract of general hiring. That is to say, she held a permanent post in the sense of an appointment on the board's permanent staff of indefinite duration. She was on the board's staff as senior clerk at an annual salary of £300 with yearly increments and that clearly meant on their permanent staff. On the view that she held her post under a general hiring, her service could not be terminated inside a year and

then only on reasonable notice before the expiry of the year, failing which it would continue for a further year. It is quite impossible, in my opinion, to hold that during this period she was holding a life-long appointment.

I come now to September 3, when the terms and conditions of service (conveniently referred to as "the September conditions") were approved. It is common ground that these became conditions of the appellant's service. The appellant says in her affidavit that she accepted them. It is immaterial whether they became contractual conditions or were imposed by effect of statute. The appellant's case is built up on the language of paragraph 12 of Part V of these September conditions. This paragraph starts with a statement which is no more than declaratory of the common law, viz., that the board may dismiss any officer for gross misconduct and any officer who is proved to their satisfaction to be inefficient and unfit to merit continued employment. The paragraph would be neither better nor worse if this opening statement had been omitted altogether. But it serves as an introduction for what immediately follows, for the paragraph provides that except where an offic has been guilty of gross misconduct the board shall give him at least one month's notice of dismissal under the rule. Alternatively, they may order reduction in rank of an officer who is found to be unfit to discharge the duties of the grade in which he has been employed. These may well be regarded as provisions favourable to the inefficient officer. At any rate, they fix the minimum amount of notice for dismissal on the ground of inefficiency and to that extent may modify the common law rules as to notice in such a case, or at least remove uncertainty upon the point. It may be noticed in passing that nothing is said about notice of dismissal for gross misconduct, but, in my opinion, the clear implication is that the common law power of summary dismissal is left to operate in such a case. The paragraph concludes with the sentence: "One month's notice in writing shall be given by all permanent "officers who wish to terminate their employment with the board." This condition is not, in my opinion, entirely unrelated to what has gone before, because it would apply to an officer who had, by order of the board, been reduced in rank and who was unwilling to accept such reduction. And this may well explain the heading to the paragraph: "Dismissal and Reduction in Rank and termination of em- "ployment otherwise." But it also has, I think, a wider ambit and would apply to any officer who for any reason wished to terminate his employment with the board.

The appellant's contention is that, apart from some special cases of dismissal or termination of employment dealt with in other paragraphs of the September conditions, paragraph 12 is exhaustive of the powers of the board to terminate her employment. I am quite unable to accept that contention. As I have said, the opening words of the paragraph are mere surplusage. If they are omitted, as they might well have been, the paragraph would be nothing but a statement of the length of notice to be given by the board in a case of inefficient service, with an alternative of reduction in rank, and a statement of the length of notice to be given by a permanent officer wishing to terminate his employment. It is impossible, in my opinion, to extract from this an implication, and it can only be an implication, that the appellant and indeed all the other permanent officers hold lifelong appointments except in certain circumstances in which the appointments are expressly authorised to be terminated. Appeal was made to the maxim "Expressio unius exclusio alterius." But a declaration in the conditions of certain common law powers of the board cannot, in my opinion, exclude other common law powers that the board may have to terminate contracts of service. The invocation of the maxim here is, in my opinion, inapposite. I would refer in this connection to what, I think, is accurately expressed in Halsbury's Laws of England, 3rd ed., vol XI, p. 395, § 644, as follows: "The maxim, however, requires to be applied with caution. "The failure to make the *expressio* complete may be accidental; and "the maxim ought not to be applied when its application, having "regard to the subject-matter to which it is to be applied, will lead "to inconsistency or injustice. It should only be applied when the "instrument, on the face of it, apparently contains all the terms "which the parties have agreed upon."

In this connection it is illuminating to look at paragraph 19 of the September conditions. This deals with absence and pay on sick leave. There is no express provision, however, for termination of employment in the event of prolonged ill-health. There appears, however, in paragraph 19 (3) (*h*) this statement: "The provisions "of this scheme shall cease to apply to an officer on the termination "of his employment whether by reason of permanent ill-health or "infirmity of mind or body or by reason of age, but without pre-"judice to the right of an officer whose employment is terminated "by reason of permanent ill-health or infirmity to receive the period "of notice provided by his contract of service."

It is plainly the assumption of this paragraph that an officer's service may be terminated by reason of permanent ill-health or

infirmity and this, of course, would be so at common law. Thus we have again another illustration of a direction as to the period of notice to be given in a situation which presupposes the terminability of the employment. The reference to the period of notice provided by the contract of service may create a difficulty where there is no contract of service expressly dealing with the matter. But that rather strengthens the view that the contracts of service are terminable generally. If there is no special period of notice, parties will just have to fall back upon common law rules. It may be noticed here that the contracts of service with the board will vary as to the length of notice required in cases not specially noticed in the September conditions or in the contracts of service, for some employees are engaged, under the conditions, at yearly salaries paid monthly and others at weekly salaries. In the result, my view is that wherever the matter can be tested by a reference to particular conditions, it is not the circumstances in which service can be terminated that are being dealt with, but the length of notice required in particular cases. I can find no reason for thinking that the ordinary common law rules governing the relations between master and servant are being otherwise abrogated.

I do not find any of the cases that have been cited helpful. In only one was it held that a servant held a lifelong appointment subject to satisfactory service and that was the case of *Salt v. Power Plant Co. Ltd.*[1] That was a very exceptional case of employment for a defined temporary period of service which could be terminated by notice within a further fixed period of time "and in the absence of such "notice the engagement to remain in force as a permanent one sub-"ject to your continuing to perform your duties to the satisfaction "of the directors." The language used and the contrast between the two periods of service were there so strong as to render inevitable the conclusion that a lifetime service was intended. It was sought to equate the probationary period of service in the present case followed by a subsequent period of service on the permanent staff with the two periods of service in *Salt's* case[1], but the comparison is, in my opinion, invalid, particularly when regard is had to the entirely different terms of service in the present case.

I would add that the presumptions are all against the claim made by the appellant. There are judicial offices held ad vitam aut culpam for historical and constitutional reasons which it is unnecessary to

[1] [1936] 3 All E.R. 322.

explore. But it would need the clearest language to convince me that a contract of personal service was intended to be a contract for life, or a contract to endure till a servant has qualified for a full retirement pension. The position in the present case, if the appellant's argument be acceded to, would be the more remarkable in that it would be only the board that was bound, for the servant is entitled to terminate his employment at any time on one month's notice. Specific performance of such a contract could not, of course, be enforced, but refusal by the board to continue to employ the appellant would be a breach of contract sounding in damages. In the case of employment on the permanent staff of public bodies there is, no doubt, often an expectancy of permanence for the working life of the servant. But the law would be slow to hold, for obvious reasons, that a servant is bound to give lifelong service, or a master to afford lifelong employment. The appellant's case seems to have stemmed in origin from the idea that the advertisement was an offer of such an employment, which conceivably might have been as much to her detriment as to her benefit. But the appointment advertised was what she in fact got, a permanent and pensionable appointment in the sense of an appointment on the board's permanent staff and an appointment which would bring her under a pension scheme. That is all, in my opinion, that the advertisement could reasonably convey. If the advertisement were to be treated as an offer accepted by her, it would, in my opinion, be quite unreasonable to construe it as an offer binding her and the board to a lifelong contract of employment. Nor are the September conditions, in my opinion, capable of being construed as binding the board to any such contract.

I would dismiss the appeal.

LORD EVERSHED: My Lords, if the terms of the appellant's service depended only upon the respondent's advertised offer and its acceptance by the appellant, I should think that the respondents were entitled to succeed; for I should not regard the use of the word "permanent," even when the word "pensionable" is added to it, as sufficient in that context to create a promise of a life employment or to disable the respondents as employers from terminating the employee's contract of service upon reasonable notice. And I should reach the same conclusion if the terms of the relevant contract were derived from the respondents' secretary's letter of July 29, 1948, with or without the advertisement. Whether or not a servant, engaged according to the terms contained in the advertisement or to those in the letter or both, should be treated as engaged upon "a general

"hiring," I do not, for my part, think that, in a contract of service, use of the word "permanent" would be of itself sufficient to import the notion of a life appointment. The word is clearly capable, according to the context, of many shades of meaning; and it seems to me of considerable importance, in interpreting its use in a contract of service, that such a contract cannot be specifically enforced.

But the appellant was, until February 16, 1949, upon probation only; and it is not in doubt that during that period she had no security of tenure. She was, however, at the end of the period, taken on as an established officer. In the meantime, as she stated in her affidavit, she had received a copy of the staff conditions and terms of service which have been referred to in the case as "the September "conditions." In my judgment, her service was, after February 16, 1949, governed by the September conditions, and I agree with the learned Lord Chief Justice of Northern Ireland that thenceforth the contents of the advertisement formed no part of her contract. Thenceforth the advertisement seems to me only significant as a matter of history and as showing that the appellant was (after February, 1949), and was intended to be, a member of the established or "permanent" staff of the board, whose service was regulated by the September conditions. For, with all respect to the noble Lord, Lord MacDermott, I do not think that the September conditions as a whole (and particularly Part V of them) applied to "temporary employees." The final paragraph of Part III of the conditions seems to me to indicate that, in the case of temporary employees, only Part I of the conditions, that headed "Grades, Numbers and Rates of Remune- "ration," would (in the absence of special terms of engagement) be applicable.

The sole question in the appeal, then, is whether, as regards determination of the service of "permanent" officers, the contractual terms are to be found exclusively in Part V of the September conditions, including paragraph 12, which has already been read to your Lordships. This question is one of the proper construction of the conditions and its difficulty is emphasised by the circumstance that your Lordships have disagreed upon it, as did the members of the Court of Appeal in Northern Ireland. My Lords, I have reached the conclusion that these September conditions should, upon their true interpretation, be taken as intended to comprehend the whole terms of the contracts of service of those to whom they are applicable. Much may turn upon the premise to a consideration of the

meaning of the conditions—whether, in a contract of service made in the twentieth century with a statutory board such as the respondents (whose established officers participate in the pension scheme contained in regulations promulgated by the Ministry of Health and Local Government of Northern Ireland), it is correct to regard the common law right of a master to determine his servant's engagement as of so well-established and paramount a character that the contract should be interpreted as necessarily subject to that right (and to a corresponding right on the part of the servant), so that only the clearest express terms will exclude it. Such was the view of the learned Lord Chief Justice of Northern Ireland and Black L.J. It was observed in the course of the debate before your Lordships by my noble and learned friend, Lord Goddard, that in any contract of service of the Crown (e.g., in the Civil Service) there always resides in the Crown a right of determination, though, in the absence of misconduct or incapacity, its practical significance may be negligible. In the present case the learned judge at first instance, Curran J., decided the question on the basis that the appellant was in truth a Civil Servant, a basis which has since been conceded to have been erroneous. But it is clear, as Lord Goddard pointed out, that in substantial characteristics the present contract is, and was intended to be, similar to the contract of a Civil Servant. It is, however, not a contract of service of the Crown and the paramount right of the Crown has no application to it. On the other hand, if the analogy was intended, should not the practical results have been intended also?

In my judgment, the September conditions, viewed as a whole, appear to be intended as truly comprehensive, and, in regard to determination, as exhaustive. It is to be noted that if the respondent's argument is correct, the prima facie right at law to determine the contracts of their senior staff (including, for example, the medical adviser who, by another provision of the conditions, must be a medical practitioner of at least 10 years' standing) and of their intermediate staff, is subject to the substantial qualification that the Ministry's approval must be first obtained (see Part I); for on this view I cannot regard the word "removals" as limited to dismissals for misconduct or incapacity. I refer also to paragraphs 5 and 8 in Part V ("Increments" and "Efficiency Bar"), both of which by their language assume that service will continue, though the officer has not shown himself "satisfactory" or "entirely suitable." I refer also to the elaborate provisions in regard to sickness payments in paragraph 19.

I turn to the all-important paragraph 12. It is true that the presence of the special provisions of paragraph 9 as regards oaths of allegiance, and of the provisions and inferences of paragraph 19 (3) (*h*) relating to the case of an officer incapable through illness of performing his part of the contract at all, show that paragraph 12 does not in its context exhaustively cover every case of determination. But it does not, in my judgment, follow that the paragraph is nevertheless subject to some overriding power of determination which finds no reference or allusion at all elsewhere throughout the conditions.

If paragraph 12 had ended with some such formula as "but the "employment of permanent officers shall not otherwise be termin- "able," it could not, I conceive, have been contended that the board was still possessed of a vested right to determine any officer's employment upon reasonable notice. The paragraph does not, of course, so end, but it is introduced by the heading "Dismissal and "Reduction in Rank, *and termination of employment otherwise*." I am unable to accept the view of the heading that it is a mere summary of, and can have no effect upon, the paragraph which follows and the scope of which should be determined by a first reading of it without regard to the heading. The heading is part of the conditions, and according to ordinary principles of construction its last five words mean and would be taken by a reader to mean that in the succeeding paragraph would be found reference to the circumstances in which alone, apart from dismissal, a service contract might be terminated. If express provision is made elsewhere in the conditions for dismissal (as in paragraph 9) the exhaustive character of paragraph 12 is, no doubt, to that extent necessarily qualified. But I have been unable to agree that the paragraph 12 is further limited and, particularly, that its purpose is confined to an expression of specific limitations upon more general though undefined rights, on both sides, said to be implicit in the contracts of service. The express power to dismiss for gross misconduct would be inconsistent with that view, or, at best, otiose. Nor can I regard the dual requirement of inefficiency and unfitness as of substantial weight in favour of the respondents' view.

Emphasis was laid in the course of the argument for the respondents and in the judgments of the majority in the court below upon the absence of reciprocity introduced by the last sentence in the paragraph, "One month's notice in writing shall be given by all

"permanent officers who wish to terminate their employment with "the board"; and it was stressed that the form of the words I have quoted rather assumed and defined than conferred a right on the officer's part to terminate his employment. In my judgment, the last-mentioned criticism is not more than a criticism of the elegance of the paragraph. In its context the last sentence, to my mind, is, and is intended to be, a complete statement of the officer's right of voluntary termination. And the argument upon reciprocity seems to me, with all respect to those who have taken a different view, to beg the very question which we have to decide. As a matter of practical common sense the situation of the employer board and that of one of its servants are very different. The loss or damage to the board occasioned by the departure of one of its servants would, save in very exceptional circumstances, be negligible. To a servant, certainly a servant in the position of the appellant, the security of employment with the board for the period of working life is of immense value.

I therefore conclude that the effect of the September conditions which the respondents put forward and made the contractual basis of the appellant's service was that, so long as she did not render herself liable to dismissal on one or other of the grounds expressly stated in her contract and was willing and able to serve the board, the appellant was entitled to continue in her employment for her life. Mr. MacDermott suggested that the respondents' offer of security of employment should, on the true effect of the conditions, be taken as subject to the qualification that the "job" for which the appellant was engaged remained available, having due regard to the nature and scope of the board's statutory activities. But all your Lordships were of opinion that such a qualification could not, as a matter of construction, be extracted from the conditions. If the power of termination upon reasonable notice implicitly remains in the respondents, then the occasion and purpose of its exercise are irrelevant.

The result, on the view which I take, may be to saddle the respondents with contracts with their officers which they ought not reasonably to have undertaken or contemplated, though I do not accept the view (particularly in the light of the advertisement and her own sworn evidence) that the appellant herself could never have so regarded her prospects when, after receiving the conditions, she became one of the board's "permanent" officers. But as Scrutton L.J. observed in his judgment in *Reigate v. Union Manufacturing Co.*

(*Ramsbottom*) *Ltd.*[1], quoted by Porter L.J. in the court below: "The "first thing is to see what the parties have expressed in the contract; "and then an implied term is not to be added because the court "thinks it would have been reasonable to have inserted it. . . ."

For the reasons which I have tried to express I would allow the appeal.

*Appeal allowed.*

Solicitors for the appellant: *Gouldens* for *J. Morris McKee*, Belfast.

Solicitors for the respondent: *Howlett & Co.* for *Cleaver, Fulton & Rankin*, Belfast.

F.C.

[1] [1918] 1 K.B. 592, 605.

## PORTER v. BOOMER[1].

*Motor vehicle—Excise duty—Vehicle assessed as "farmer's goods vehicle"—Conveyance of cattle—Whether "articles required for the purposes of agricultural land"—Vehicles (Excise) Act (Northern Ireland), 1954 (2 & 3 Eliz. 2, c. 17), s. 26.*

A motor vehicle which had been assessed for duty under section 5 of the Vehicles (Excise) Act (Northern Ireland), 1954, as a "farmer's goods vehicle" was used by the owner to transport cattle from a market to his farm. By section 26 of the Act a vehicle can qualify as a "farmer's goods vehicle" only if it be used by the owner solely for "the conveyance of the produce "of, or of articles required for the purposes of, the agricultural land which he "occupies."

*Held*, by the Court of Appeal (Lord MacDermott L.C.J. and Black L.J., Curran L.J. inclining to the same view without expressly so deciding), that the word "articles" in its natural and ordinary meaning is restricted to inanimate chattels, and that there was nothing in the context of the word in the present Act to indicate that it was intended to have a wider meaning.

Per Curran L.J. The conveyance of cattle for the purposes of grazing and fattening would not be a conveyance of "articles required for the purposes "of agricultural land."

CASE STATED by the Resident Magistrate sitting at Kilrea Petty Sessions.

On October 6, 1955, the respondent, a farmer and cattle dealer, transported three head of cattle which he had bought at the Kilrea Auction Mart to his farm in a motor vehicle, described in the case stated as "an Atkinson lorry—of the kind known as a cattle float." In the course of this journey the vehicle was stopped on the public road near Kilrea by the police who took the particulars of its registration and taxation under the Vehicles (Excise) Act (Northern Ireland), 1954. The vehicle was registered in the name of the respondent as owner, and duty under the Act had been paid in respect of it in the sum of £12 11s. 2d., covering the period June 1, 1955, to December 31, 1955. This assessment had been made under section 5 of the Act in accordance with Part I of the fourth schedule thereto, on the footing that the vehicle came within the category therein described as "farmers' goods vehicles." The duty payable under this head for a full year is £20 10s. 0d. Had the vehicle been assessed under Part I of the said schedule as a "goods vehicle" the annual duty would have been £75.

The respondent was prosecuted at Kilrea Petty Sessions on a charge preferred under section 13 of the Act, alleging that he had used the

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: April 18, May 17, 1957.

vehicle in a manner and for a purpose which brought it into a class or description to which a higher rate of duty was applicable under the Act than that which had been paid. The resident magistrate dismissed the summons on the merits, but at the request of the appellant stated a case for the opinion of the Court of Appeal. The question raised in the case stated was whether the three head of cattle were "articles "required for the purposes of the agricultural land" which the respondent occupied, within the meaning of that phrase contained in section 26(1) of the Vehicles (Excise) Act (Northern Ireland), 1954.[1]

*Brown Q.C.* and *MacDermott* for the appellant.

*Lowry Q.C.* and *Hutton* for the respondent.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J. stated the facts and continued: The issue between the parties turns, as I see it, on the meaning of the word "articles" in this definition. If the word as there used includes cattle we must, I think, take it that the vehicle was being used at the material time as a "farmer's goods vehicle" and that no further duty was payable. But if, on the other hand, the word in this context does not include cattle, the vehicle was being used for a purpose which attracted the higher rate of duty payable in respect of a "goods vehicle."

In my opinion the ordinary and natural meaning of the word "article" is such as to exclude animals. The cases on the point are few. In *Llandaff and Canton District Market Co. v. Lyndon*[2] the word was held to include a horse. The question arose there on the true construction of section 25 of the Llandaff and Canton District Markets Act, 1858, which enacted that "every person who shall "sell....at any place within the limits of this Act....any article "in respect of which tolls are by this Act authorised to be taken, "other than eggs, butter and fruit, shall forfeit and pay to the "company any sum not exceeding 40s." By a schedule to the Act a toll was imposed on horses and it is clear that the decision of the court was based largely on this consideration. In the course of his judgment Erle, C.J. (with whom Williams and Willes, JJ. concurred) said[3]: "I am of opinion that the word 'articles' in that section was

1 Vehicles (Excise) Act (Northern Ireland), 1954, s. 26(1): "....'Farmer's "'goods vehicle' means a goods "vehicle registered under this Act in "the name of a person engaged in "agriculture and used on public "roads solely by him for the pur- "pose of the conveyance of the pro- "duce of, or of articles required for "the purposes of, the agricultural "land which he occupies, and for no "other purpose;..."

2 (1860) 8 C.B. (N.S.) 515.

3 Ibid. 523.

"intended to comprise everything in respect of which a toll is pay-
"able; and horses I find specifically mentioned in the schedule."
In *R. (Portadown U.D.C.) v. Armagh JJ.*[1] a Divisional Court (Moore L.C.J. and Brown J.) held that a live pig was an "article or thing" within the meaning of section 1(1) of the Street Trading (Regulation) Act (Northern Ireland), 1929. In the course of delivering the judgment of the Court, Moore L.C.J. said[2]: "I am disposed "to consider that 'article' is appropriate to inanimate chattels; " 'thing' both to animate and inanimate:" and later he added[3]: "As I have already said, I think that 'article' is applicable to in-
"animate, but 'thing' to both live and dead matter; it is an alter-
"native to 'article' and not limited by it, and may even extend it."
The basis of the decision appears from a paragraph towards the end of the judgment in which the Lord Chief Justice says[4], "In conclusion, "we have no doubt that 'things' include pigs live or dead...."
This decision would certainly seem to exclude animals from the natural and ordinary meaning of the word in question, and that view was favoured by the Queen's Bench Division in England (Lord Goddard C.J., Byrne and Parker JJ.) in *Daly v. Cannon.*[5] There the question arose on the construction of section 154(1) of the Public Health Act, 1936, which provides that "No person who "collects....rags....shall....while engaged in collecting....sell "or deliver....any article whatsoever to a person under the age of "14 years." The defendant, a rag collector, had been charged with delivering to a child under the age of 14 a live goldfish while he was engaged in collecting rags, and the court held that a goldfish was not an "article" within the meaning of the enactment quoted. In the course of his judgment, with which the other members of the court agreed, Lord Goddard says[6]: "Would anybody in ordinary "common parlance talk about a goldfish as an 'article'? I do not "think he would. If the statute had said 'article or thing,' as some "statutes have provided, there could be no doubt, I think, that a "goldfish would be a 'thing' ", and he then cites the judgment of Moore L.C.J. from which I have already quoted. We were also referred to a Scots case, *M'Intyre v. M'Intee*[7]. There it was held that the expression "any article" in section 206 of the Glasgow Police Act, 1866, included a quantity of rags. The question as to whether the expression was confined to inanimate chattels did not arise, however, and I need not refer further to the details of that case.

[1] [1931] N.I. 209.
[2] Ibid. 212.
[3] Ibid. 213.
[4] Ibid. 214.
[5] [1954] 1 All E.R. 315.
[6] Ibid. 316.
[7] [1915] S.C. (J.) 27.

But if the word in its natural and ordinary meaning is confined to inanimate chattels, the *Llandaff* case[1] makes it clear that it is capable of an extended meaning, and of including animals if the context so requires. If I am right in the view I have taken of the primary meaning, the question which must next be decided is whether in this case there is anything in the Act to justify giving the word a meaning which would include animals. The immediate setting of the word in the definition under consideration is the description "....articles required for the purposes of....agricultural land...." The word is used in this or a similar setting in other parts of the Act, as for example in section 4(2) para. (a), sub paras. (ii), (iv) and (v), and subsection (3) para. (b). I may say at once that I am unable to find anything in these parts of the Act or elsewhere to indicate that the extension of the word to include animals would be at variance with the purposes of the Act or the requirements of the context in the several places where the word is used. It would, I think, be taking a very narrow view of expressions such as "the purposes of agricultural land" or "required for agricultural land" to hold that they negatived a meaning of the word which included animals. But as I see the matter, this is not the question which we have to decide. Taking the view of the natural and ordinary meaning of the word which I have stated, the question is not whether the context can tolerate or accept an extended meaning, but whether it shows that the word is used in the extended and not in the ordinary sense. In my opinion there is nothing in the Act which requires that the word should be given anything more than its natural and ordinary meaning. The context seems to me to fit that meaning and to call for nothing else. For that reason I think the contention advanced on behalf of the complainant, that the word "articles" does not include animals, is correct.

I am accordingly of opinion that the resident magistrate was wrong in law and that the question stated by him for the opinion of this court should be answered in the negative.

BLACK L.J.: The question for decision in this case is whether the three head of cattle which were being conveyed in the defendant's lorry on October 6, 1955, were "articles required for the purposes of "the agricultural land" which the defendant occupied within the meaning of that phrase in the definition of "farmer's goods vehicle" contained in section 26(1) of the Vehicles (Excise) Act (Northern Ireland), 1954.

[1] (1860) 8 C.B. (N.S.) 515.

This question really resolves itself into two separate questions, viz. (a) were the cattle "articles" within the meaning of that word as used in the definition, and (b) if the cattle were articles were they articles required for the purposes of the defendant's agricultural land? Neither of these questions seems to me one on which it is easy to pronounce an answer with complete confidence.

It is certainly possible that a living animal may be an "article" within the meaning of an Act of Parliament if the terms of the Act appear so to indicate. An instance is the case of *Llandaff and Canton District Market Co. v. Lyndon*[1], to which the Lord Chief Justice has referred. But a perusal of the Vehicles (Excise) Act (Northern Ireland), 1954, does not appear to me to disclose any clue whatever as to whether the Legislature did or did not intend that cattle should be included in the word "articles" as used in the definition of "farmer's goods vehicle" in section 26(1) of the Act. Accordingly, it seems to me that the question is whether in ordinary parlance one would in such a context speak of cattle as "articles." A resort to standard dictionaries has failed to give me any real assistance. In *M'Intyre v. M'Intee*[2], the Lord Chief Justice (Lord Strathclyde) observed in regard to another Act of Parliament: "The statute gives "us no definition of 'article.' That is not surprising, for everyone "understands the meaning of 'article' ". After hearing the argument in the present case I feel that this dictum must be regarded as over-optimistic. The Lord Justice General then proceeds: "A more com-"prehensive word could not by any possiblity have been used."

The last dictum is hardly in accord with what has been said in certain English and Irish cases. In *R. (Portadown U.D.C.) v. Armagh JJ.*[3], Moore L.C.J. in delivering the judgment of a Divisional Court expressed the opinion that a live pig was not an "article" within the meaning of the phrase "any article or thing" as used in section 1(1) of the Street Trading (Regulation) Act (Northern Ireland), 1929, on the ground that in its ordinary sense the word "article" is appropriate to inanimate chattels. This expression of opinion was, however, really obiter as the court held that the word "thing" had a much wider meaning and included both live and dead matter, so that the live pig was undoubtedly a "thing" within the meaning of the section. Moore L.C.J's. view of the meaning of the word "article" was followed by Mr. J. P. Eddy, Q.C., the stipendiary magistrate at West Ham in December, 1952, in a case of *West Ham Corporation v. Markham*[4], the learned magistrate holding that a

[1] (1860) 8 C.B. (N.S.) 515.
[2] [1915] S.C. (J.) 27, 28.
[3] [1931] N.I. 209.
[4] (1953) 117 J.P. (Jo.) 24.

live goldfish was not an "article" within section 154(1) of the Public Health Act, 1936, on the ground that nobody in ordinary conversation would refer to a goldfish as an article. In the next year the point was brought for decision to the Queen's Bench Division in *Daly v. Cannon*[1], and the Divisional Court (Lord Goddard C.J., Byrne and Parker JJ.) approved the decision in *West Ham Corporation v. Markham*[2], the Lord Chief Justice saying: "Would anybody in "ordinary common parlance talk about a goldfish as an article? I "do not think he would." It is right, of course, to notice that in the earlier case of *Henderson v. Robson*[3], Lord Goddard had let fall an observation which suggested that he might have regarded a farm horse which was being brought to a farm for ploughing as falling within the phrase "an article required for a farm." But this remark was obviously very much obiter and does not detract from the view on which the Divisional Court rested in *Daly v. Cannon*[1], that the word "article" must be taken as used with the meaning which it would bear in ordinary common parlance.

Applying this test in the present case I do not think that in ordinary common parlance one would speak of cattle as "articles," and accordingly (though not without a certain degree of hesitation) I hold that cattle are not "articles" within the definition of "farmer's "goods vehicle" contained in section 26(1) of the Act of 1954.

If I am correct in this view this is sufficient to dispose of the case. The other question which might arise as to whether the cattle were required for the purposes of the defendant's agricultural land appears to me to be even a more difficult one. I think the view which one would first be disposed to take would be that articles required for the purposes of agricultural land meant such things as seeds and fertilisers and implements of husbandry, in short, such things as would promote the growth of crops and herbage on the land, whereas so far from the cattle being used for the purposes of the land the position was quite the reverse and the land was set apart, fenced, watered, manured, etc., for the purposes of feeding the cattle. On the other hand, it might be, as the Lord Chief Justice has suggested, that when one asks what are the purposes of a grazing farm the answer must be that its purposes are the depasturing of cattle and the most essential thing required in order that it may fulfil that purpose is a stock of cattle. The difficulty appears to reside in what precisely is meant by "purposes." But as I have held that cattle are not articles the difficulty does not arise so far as the

[1] [1954] 1 All E.R. 315.
[2] (1953) 117 J.P. (Jo.) 24.
[3] (1949) 113 J.P. 313.

present judgment is concerned. Any expression by me of an opinion on the matter would be (or might be) purely obiter and I prefer to refrain from expressing any decided view on a point which may never arise and which is one upon which I find great difficulty in arriving at any confident conclusion.

CURRAN L.J.: When the Legislature, in defining a "farmer's goods "vehicle" in section 26(1), refers to articles required for the purposes of the agricultural land it is not merely referring, in my opinion, to articles that may benefit the agricultural land. It is referring to articles that are being carried to the land for that purpose, or other purposes of the agricultural land, or, having been on the land for such purposes, are being conveyed from the land. If it be assumed that "articles" may include animals, then it may be said, as the defendant contends, that putting them on agricultural land may improve the land, as by manuring it. But in my view the material question is whether it is for that purpose, that is to say, whether it is *because* they are required for that purpose, that they are being conveyed. In the present case the defendant and respondent is not merely a farmer but also a cattle dealer. We are not told what type of cattle he was conveying in his vehicle. If they were cows would he not be carrying them to his farm for the purpose of producing milk? If they were bullocks would he not be carrying them because he had bought them as a cattle dealer and was taking them to his farm to keep them, or fatten them, with a view to selling them? In either event, in my opinion, he would not be conveying the cattle as articles required for the purposes of his agricultural land.

The onus of establishing a case against the defendant and respondent is on the complainant and appellant. The resident magistrate has found that that onus has not been discharged, that as the cattle could be beneficial to the agricultural land the complainant must prove that they were not being conveyed for that purpose. I find myself unable to agree with that finding. In my opinion, the complainant has established a prima facie case to which, as at present advised, I can see no possible answer.

Having regard to the view I take I find it unnecessary to consider whether or not "articles" includes animals. If it does I have difficulty in envisaging in what circumstances it would include cattle. I prefer, however, to keep the question open as a case may arise in which the facts and arguments may throw some further light on the matter.

The question asked in the case stated is not based upon the facts found by the resident magistrate, but upon the assumption he makes that the cattle in question may have been conveyed in the vehicle in question for the purpose of grazing and fattening on the farm's pasture and, in addition or in the alternative, for the purpose of manuring the farm's soil; and that the complainant had the onus of negativing each and all of these possibilities. In my opinion, and for the reasons I have given, that is not the position in this case. I would answer the question by holding that in conveying cattle for the purpose of grazing and fattening them the defendant would not be conveying articles required for the purpose of his agricultural land; and that the assumption that he might be conveying them for the sole purpose of manuring agricultural land is one which, on the facts of this case, should not be made.

*Appeal allowed.*

Solicitor for the appellant: *R. Evan Burns.*

Solicitor for the respondent: *John T. McConnell.*

S.M.M.

# IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF MICHAEL MOLEY, A REGISTERED OWNER OF LAND, FOLIO 9575 COUNTY ARMAGH[1].

*Local Registration of Title—Holding purchased under Land Purchase Acts and subject to annuity—Mortgage of holding by demise for a term—Consent of Ministry of Finance not obtained—Mortgage registered as a charge on the lands—Validity of charge—Jurisdiction of court to direct cancellation of an invalid charge—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *ss.* 14, 34, 40—*Northern Ireland Land Act*, 1925 (15 & 16 *Geo.* 5, *c.* 34), *ss.* 30(1), 32(6).

M., the registered owner of a holding purchased under the Land Purchase Acts and subject to a land purchase annuity, obtained an advance from a building society on the security of his holding. A deed in the form of a mortgage by demise for a term of 5,000 years was executed by M. and the building society, and the society, with the consent of both parties, was registered as the owner of a charge on the lands. The entry on the folio stated that the society "is registered as the owner of a charge on the lands "herein by way of demise...."

Subsequently M. applied to the court for an order directing the cancellation of the charge in favour of the society on the ground that it was invalid, the basis of the application being that a charge effected by way of demise constituted a "letting" of the holding and that such a letting was avoided by section 30(1) of the Northern Ireland Land Act, 1925, since the consent of the Ministry of Finance had not been obtained.

*Held* by the Court of Appeal (Lord MacDermott L.C.J., Black L.J. and McVeigh J.), affirming the decision of Curran J., (i) that, as between the parties to the transaction, the court had jurisdiction under section 34(2) of the Local Registration of Title (Ireland) Act, 1891, to direct the cancellation of an invalid charge appearing on the register;

(ii) that the fact that one of the parties to an invalid charge would be damnified by its cancellation did not constitute "loss or damage to any "person" for the purposes of section 34(2) of the Act of 1891, as amended, so as to preclude the court from directing such cancellation;

*In re Alice Trainor* [1936] N.I. 197 followed;

(iii) that the mortgage by demise did constitute a "letting" for the purposes of section 30(1) of the Act of 1925, and was therefore void;

(iv) that the deed executed by M. and the society was not effective to charge the lands otherwise than by way of demise;

(v) and that accordingly the registration of the charge in favour of the society should be cancelled.

APPLICATION by the registered owner, on notice to the Borough Building Society, for an order that the registration on Folio No.

[1] In the Chancery Division before Curran J.: June 11, 29, 1956.
In the Court of Appeal before Lord MacDermott L.C.J., Black L.J. and McVeigh J.: Oct. 29, 30; Nov. 1; Dec. 20, 1956.

9575 County Armagh of an alleged charge in favour of the said society be struck out.

The facts of the case appear sufficiently in the headnote and in the judgments.

*Lowry* for the applicant.

*Patton Q.C.* and *Gibson* for the respondent.

CURRAN J.: This is an application by the registered owner, on notice to The Borough Building Society, for an order that the registration on Folio No. 9575 County Armagh of an alleged charge in favour of the said Society, registered April 24, 1950, may be struck out on the grounds that the instrument of charge purports to be a mortgage by demise of the lands comprised in the said folio; that the Ministry of Finance have given no consent thereto, and, accordingly, that the said demise is void as it is an attempted letting of a holding within the meaning of section 30(1) of the Northern Ireland Land Act, 1925.

Counsel for the Society conceded that said instrument of charge was void as a lease, but contended that it had the effect, nevertheless, of charging the lands, and that the registration of the charge was good. I must note, however, that Mr. Gibson later contended that the demise in the instrument of charge was not a "letting" and relied upon the provisions of section 3 of Deasy's Act[1]. In my opinion such contention was not well founded.

In registering the charge in question the Registrar appears to have taken the view that the demise in the instrument of charge was good. It is recorded on the folio that the Society "is registered "as owner of a charge on the lands herein *by way of demise*...." Accordingly, if, as it was conceded, the attempted demise was void, the charge as registered is, in my opinion, ineffective. If the Registrar had taken the view, contended for on behalf of the Society, that with the attempted demise expunged from it the instrument of charge was still effective to charge the lands, the Registrar should, in my view, have left out the words "by way of demise" when making the entry on the folio. This suggests a simple solution to the problem, namely, that I might direct that the entry of the charge on the folio be corrected by striking out the words "by way of demise."

Unfortunately not only am I satisfied that the instrument of charge with the demise expunged is ineffective to charge the lands, but I

[1] Landlord and Tenant Law Amendment Act, Ireland, 1860 (23 & 24 Vict., c. 154).

am satisfied that it would be ineffective to charge the lands even if the demise were good. I am very conscious of the fact that it has always been the accepted view that no assent was required from the Ministry of Finance where the instrument of charge was in the form of a mortgage by demise; and that such an instrument was effective to charge the lands demised, and so enable the person to whom the demise was made to be registered as the owner of a charge. I have been unable to find any record of this view having been challenged. It has been challenged now, and I have arrived at the conclusion that this is not a matter on which I can say that long established practice should not be disturbed.

The fundamental difficulty is, in my opinion, that the Society has insisted on obtaining a lease of the lands as its security for the repayment of advances, instead of directly charging the lands. The form prescribed by section 40(2) of the Local Registration of Title (Ireland) Act, 1891, simply charges the lands in favour of the lender. The said subsection provides, of course, that the instrument of charge may be "in such other form as may appear to the registering authority to be sufficient to charge the land...." In other words, whatever form the instrument of charge may take, it must have the same effect as the prescribed form. In my opinion this is only intended to apply to a direct or simple charge. There are, of course, other burdens which may be registered as affecting registered land. These are set out in section 45(1) of the Act. It will be noted that sub-subsection (b) refers to the direct charge to which I have referred. A number of other types of burdens are set out, and at the end of the subsection there is sub-subsection (m) "any such other "matter as may be prescribed." Order IV, rule 21 of the 1936 Rules prescribes as follows: "It shall be competent for the Registrar to "register as burdens affecting registered land, such matters as, in "addition to the burdens specified in section 45 of the Act of 1891, "may appear to him properly to charge or affect the registered "land."

If I am right in my opinion that a demise by way of security for a loan does not constitute a "charge" within the meaning of section 40 and section 45(1)(b) of the Act, it may be said nevertheless to "affect" the registered land, and to be a burden which can be registered under section 45(1)(m) of the Act.

Were the demise to the Society not void I would consider whether the registration of the charge might not be amended by substituting the word "burden" for the word "charge," and by altering the

wording of the entry. But, the fact that the demise is void, in my opinion, makes a fundamental difference. The instrument of charge purports to charge or affect the lands in a particular manner, namely, by demise to the Society as security for the repayment of advances. With the demise expunged from the instrument my opinion is that the lands cannot be said to be affected, and so no burden has been created. If I am right in this opinion it follows that section 45(1)(m) cannot be called in aid.

For the reasons set forth in this judgment I must direct that the registration of the charge in favour of the Society be cancelled.

The respondent, the building society, appealed to the Court of Appeal.

*Patton Q.C.* and *Gibson* for the appellant. The instrument of charge takes the form of a mortgage by demise, but it is only effective to give the appellant a statutory charge on the lands: see Local Registration of Title (Ireland) Act, 1891, section 40 and Northern Ireland (Miscellaneous Provisions) Act, 1945, section 9. Section 40(2) of the Act of 1891 gives the registering authority power to determine whether an instrument submitted for registration is sufficient to charge the lands, and if the registrar is satisfied that the instrument is sufficient for that purpose, the charge is registered and the decision of the registrar is conclusive.

[LORD MACDERMOTT L.C.J. Has the court not the same jurisdiction as the registrar?]

We submit not. Once a charge is registered the matter is concluded, unless there is an appeal against the registrar's decision under section 14 of the Act. The virtue of a scheme of registration lies in the fact that the register is conclusive.

[LORD MACDERMOTT L.C.J. Then do you say that Curran J. had no jurisdiction to make the order appealed against?]

The point taken below was that the registrar's decision was final, but we now say that the court has no jurisdiction. The time for appeal under section 14 has long expired, and no application has been made to extend it. The only other section which could give jurisdiction is section 34; section 34(1) does not cover this case, and section 34(2) (as amended by the Northern Ireland Land Act, 1925, section 32(6)) is qualified by the proviso that the court must be satisfied that the error can be corrected without loss or damage to any person.

The instrument in this case was registered as a charge on the lands, rightly in our submission, but the registrar should not have added the words "by way of demise." Had the instrument been treated as a lease, it would have been registered as a burden under section 45, instead of under section 40, but we say it could not have been so treated. A lease is defined by section 95 as a contract of tenancy, and, under section 3 of Deasy's Act, the relationship of landlord and tenant arises from contract, express or implied. There is no such express contract and it is not to be implied unless a rent is reserved, and thus in this case, where no rent was reserved, the relationship of landlord and tenant is not to be implied, so that there is no "contract of tenancy" and no "lease" capable of registration under section 45.

[Lord MacDermott L.C.J. Do you say a lease under seal where no rent is reserved cannot be registered as a burden on registered land?]

Even in the case of unregistered land, it is not every demise which creates the relationship of landlord and tenant, as for example, terms created to secure portions.

[Black L.J. What is prohibited by section 54 of the Land Purchase Act, 1903, and section 30 of the Irish Land Act, 1881, is the "letting" of holdings without the requisite consent. Cannot lands be "let" without a rent being reserved?]

The lands could be demised for no rent, but in this context "demise" is not the same as "let". The Land Acts, 1870 and 1881, are to be construed together with Deasy's Act: see per Palles C.B. in *Ireland v. Landy*[1].

The instrument, of itself, gave the appellant no interest in the lands (*Northern Banking Co. Ltd. v. Devlin*[2]) and its form is not significant so long as the registrar is satisfied that it is sufficient to charge the lands. It is abundantly clear from the terms of the instrument that the parties intended to create a charge on the lands; and even if it be the case that the demise is avoided by section 30(1) of the Northern Ireland Land Act, 1925, the terms of the instrument, apart from the demise, show sufficiently that a charge was to be created. The rights given to the appellant by the instrument are the same rights as it would have had if a simple charge had been executed.

[Lord MacDermott L.C.J. That would have been more relevant if the instrument had been drafted with the provisions of the 1891

[1] (1887) 22 L.R.Ir. 403, 421. [2] [1924] 1 I.R. 90, 94.

Act in mind, but it is apparent that it was drafted on the basis of an ordinary mortgage deed.]

[BLACK L.J. You say that the parties intended to create a charge on the lands, but it seems to me that the draftsman only meant to charge the lands for the term of 5,000 years, and not in fee simple.]

Under section 40 of the Act of 1891, no instrument creates any rights over registered land until it has been registered, and once registered it gives those rights, and only those rights, that are provided for by the section. The form of the instrument is merely a matter of conveyancing and does not affect the nature of the statutory rights conferred by registration.

The mortgage deed created a general charge, and even though some of the purported rights of the mortgagee are ineffective, the charge subsists. This principle has been applied in the case of company debentures which were rendered ineffective because the deeds were not properly executed (*Re Strand Music Hall Company Ltd.*[1]), or because they ought to have been registered as bills of sale: *Ross v. Army and Navy Hotel Company Ltd.*[2]; *Re Queensland Land and Coal Company Ltd.*[3].

If it be held that the appellant's charge is only a charge by way of demise, we would submit that the demise is not rendered void by section 30(1) of the 1925 Act. Provisions in leases restricting alienation are strictly construed: see per Lord Eldon in *Church v. Brown*[4], and that principle should be applied a fortiori to the statutory restrictions contained in the Land Purchase Acts. The restrictions on subletting and alienation of holdings without the consent of the landlord imposed by the Land Acts prior to the Land Purchase Acts were aimed at those transactions which resulted in a change of occupation of the lands, and the scheme of the Acts was to restrict the number of occupiers of land so as to promote the economic working of holdings. The restrictions contained in the Land Purchase Acts are comparable, except that, since the tenant has become an owner in fee simple, the restriction on subletting becomes a restriction on letting, and we submit, therefore, that since the demise in the present case did not effect a change of possession, it should not be regarded as being within section 30(1) of the Act of 1925. We admit that the clause whereby the respondent attorned tenant to the appellant may have been within that subsection.

[1] (1865) 3 De G. J. & S. 147.
[2] (1886) 34 Ch.D. 43.
[3] [1894] 3 Ch. 181.
[4] (1808) 15 Ves. 258 at 265.

Section 54 of the Land Purchase Act, 1903, is one of the sections which defines the transactions affected by section 30(1) of the Act of 1925, and it is clear from that section that the consent of the Ministry of Finance is in general unnecessary in the case of a mortgage, for while section 54(1) prohibits all lettings or subdivisions without consent, section 54(3) only provides that consent shall be obtained if the amount of the mortgage exceeds ten times the poor law valuation.

Section 54(3) also contemplates a mortgage of a part of a holding, which shows that such a mortgage does not constitute a subdivision of the holding for the purposes of section 54(1), and this also illustrates the point that the restrictions should only be applied to transactions which affect possession of the lands, and not to transactions which in form and substance are mortgages. A mortgage of a part of a holding, when registered, would operate as a statutory charge and the mortgagee would not be entitled to take possession (see *Northern Banking Co. Ltd. v. Devlin*[1]), and the only case in which the restriction on subdivision without consent would become relevant would be where the mortgagee applied to the court for possession under section 9 of the Northern Ireland (Miscellaneous Provisions) Act, 1945. In such a case the court would see that the necessary consent was forthcoming before making an order for possession.

*Conaghan* and *Lowry* for the respondent, the registered owner. The nearest analogy to the provisions restricting the subdivision and letting of land purchased under the Land Purchase Acts is to be found in the provisions of section 10 and 18 of Deasy's Act, 1860, which avoid the attempted alienation and subletting of holdings without the consent in writing of the landlord; and the cases under Deasy's Act show that those sections were rigidly enforced: see *Gillman v. Murphy*[2]; *Jagoe v. Harrington*[3]; *Clifford v. Reilly*[4] and *Donoughmore v. Forrest*[5]. Not only did the courts declare transactions which infringed those sections to be void, but, they also resisted any attempts to give effect to them by indirect means: see *Doody v. Nolan*[6] and *O'Kane v. Burns*[7].

In *Sligo C.C. v. Murrow*[8] the High Court in Eire has held that a mortgage of leasehold property executed without the written consent of the landlord was avoided by section 10 of Deasy's Act, and in

1 [1924] 1 I.R. 90.
2 (1872) I.R. 6 C.L. 34.
3 (1882) 10 L.R.Ir. 335.
4 (1870) I.R. 4 C.L. 218.
5 (1871) I.R. 5 C.L. 443.
6 (1878) 2 L.R.Ir. 199.
7 [1897] 2 I.R. 591.
8 [1935] I.R. 771.

England a mortgage by demise has been held to be a breach of a covenant against subletting: *Serjeant v. Nash, Field & Co.*[1]

The appellant in this case is trying to spell out of an instrument, which in our submission is void, some kind of equitable charge on the lands, but there is no evidence of any agreement to charge the lands other than that which appears in the instrument itself, that is, an agreement to charge the lands by way of a mortgage for a term of 5,000 years. The debenture cases cited are distinguishable in this respect, for in those cases there was evidence of an intention to charge the property apart from the deeds themselves. In the circumstances of this case, an equitable charge would be a charge against the whole interest of the respondent in the lands, which would be at variance with the intention of the parties as expressed in the deed.

Since the only evidence of an intention to charge the property is to be found in the deed, we submit that even if only the demise fails, that is sufficient for the respondent. The deed only shows an intention to charge the lands by way of mortgage for a term, and if the term is void, no mortgage, either legal or equitable has been created; nor would it assist the appellant to regard the instrument as an agreement for a mortgage for such an agreement, if the lease be void, could not be specifically enforced: see *Murtagh v. Allen*[2], a case under the Land Act, 1881.

On the question of jurisdiction, we say that this case falls within section 34(2) of the Act of 1891.

In the case of *In re Walsh*[3], Madden J. held that under section 34(2) the court had power to determine all questions as to the effect of any instrument registered, as between the parties thereto, and to rectify any error in the register accordingly, while the Court of Appeal in Northern Ireland in *In re Alice Trainor*[4] decided that to take away from a party something to which he was never legally entitled did not result in any "loss or damage" to any person within the meaning of section 34(2), as amended by section 32(6) of the 1925 Act. Thus we submit that if the appellant's charge is void, the court has power to direct its cancellation; and indeed, we would say, is bound to do so, for the wording of section 34(2) is mandatory.

[LORD MACDERMOTT L.C.J. The court may impose such terms as to costs or otherwise as it thinks fit; could the court then direct cancellation on the terms that a proper charge be substituted?]

1 [1903] 2 K.B. 304, 310, 315.
2 (1890) 27 L.R.Ir. 118.
3 [1916] 1 I.R. 40.
4 [1936] N.I. 197.

We submit that the court should consider the terms to be imposed in the light of its adjudication on the validity of the charge. The only charge which could be substituted would be a charge on the respondent's entire interest in the lands, and it would be absurd if the appellant should acquire a greater charge than they had agreed to accept.

*Patton Q.C.* in reply. In this case, there might have been an appeal against the decision of the registrar under section 14(1), and we submit therefore that there is no jurisdiction under section 34(2), for it would not be logical to have two different forms of appeal arising out of the same transaction.

*Cur. adv. vult.*

LORD MACDERMOTT delivering the judgment of the court: In this case the appellant, the Borough Building Society, appeals from an order of Curran J. dated June 29, 1956, directing the cancellation of a charge in favour of the appellant, which was registered on folio 9575 of the register of freeholders for County Armagh. Michael Moley, the respondent, has been at all material times the registered owner of the lands comprised in this folio. The charge in question was registered on April 24, 1950, the entry on the folio stating that the appellant "is registered as owner of a charge on the lands herein "by way of demise for £600. . . ." The instrument of charge (hereinafter called "the instrument") on which this entry was founded was made under seal on March 16, 1950. It was executed by the respondent as security for a loan of £600 obtained by him from the appellant. This loan is still outstanding, and reference must now be made to the circumstances that, notwithstanding this fact, led up to the respondent's application for the cancellation of the charge.

The appellant is an English Society with its chief office in Burnley and, wherever the instrument may have been drafted, it is in a form which is inappropriate as respects land compulsorily registered in this jurisdiction under the provisions of the Local Registration of Title (Ireland) Act, 1891. It is in the form of a mortgage by way of demise and it altogether ignores the form of charge referred to in section 40(2) of the Act of 1891. The consideration for the instrument is therein expressed to be the loan of £600, already mentioned. The instrument then witnesses as set out in nine numbered clauses. In clause 1 the respondent covenants for repayment of the amount advanced. In clause 2 the respondent as beneficial owner demises to the appellant his registered holding "to hold the same unto the "Society its successors and assigns for the term of five thousand "years from the date hereof." Clause 3 provides that on repayment

of all moneys due by the respondent "the term hereby created shall "cease and this security shall be discharged...." Clause 4 contains further covenants by the respondent, namely, to comply with the rules of the Society, to complete any unfinished buildings, to keep the premises in good repair, to insure to the full value, to pay the land purchase annuity and to perform and observe "the covenants "and conditions contained in folio 9575...." Clause 5 empowers the Society to take possession of the premises, even though the moneys "hereby secured" may not be due and to exercise the powers of letting, selling and appointing receivers conferred upon mortgagees by the Conveyancing Act, 1881. Clause 6 removes certain restrictions imposed by the Act of 1881. Clause 7 provides for the transfer of the security by the appellant. Clause 8 empowers the appellant to call in the entire balance owing on six months' notice, and by clause 9 the respondent attorns tenant to the appellant at the yearly rent of 6d., if demanded.

Before the passing of the Northern Ireland Land Act, 1925, this holding was subject to statutory restrictions whereby subdivision and letting were forbidden without the consent of the Land Commission or, as it later became, the Ministry of Finance. That prohibition was of a limited nature as it was expressed to be "as between" the Land Commission (or Ministry of Finance) on the one hand and the proprietor on the other. Section 30(1) of the Act of 1925 was passed to remove this limitation. It refers to the enactments which imposed it and is in these terms:

> "30 (1) Any attempted sub-division or letting of a holding, in "contravention of section thirty of the Land Law (Ire-"land) Act, 1881, or section fifty-four of the Act of 1903 "shall be void."

It is evident enough that the instrument was drafted without regard to this provision, but no one disputed the effect of the instrument at the time or questioned its registration until, almost five years later, the appellant sued by specially indorsed writ to eject the respondent on the ground that his "tenancy" at 6d. per year under clause 9 of the instrument had been determined. This claim was obviously misconceived. If the appellant had a good charge, the decision of this court in *Northern Banking Co. Ltd. v. Devlin*[1], stood in the way of obtaining possession of the lands by means of such an action, though no doubt the appellant might have applied to the court in a summary manner for possession under the provi-

[1] [1924] 1 I.R. 90.

sions of section 9 of the Northern Ireland (Miscellaneous Provisions) Act, 1945; and, apart from this procedural difficulty, any claim for possession had to face the impact of section 30(1) upon either the term which the instrument purported to create by way of security or the "letting" to the respondent under clause 9. In his defence the respondent relied upon this subsection, alleging—rightly as is now conceded—that the Ministry of Finance had not consented to the execution of the instrument. This situation produced two results. The appellant sought and obtained leave to discontinue its ejectment proceedings with a view to commencing a suit on foot of the registered charge in the Chancery Division, and the respondent, alive now to the provisions of section 30(1), applied to have the charge entry cancelled.

On this application Curran J. held that the demise was void under section 30(1) and that the instrument did not create a valid charge affecting the lands. As already stated, he accordingly ordered the cancellation of the charge.

Two main questions arise for determination. Did the instrument create a valid charge capable of registration? And, if not, can the register now be altered by cancelling the charge entry?

The second of these questions is procedural and appears to have been raised for the first time by this court at the hearing of the appeal. But it goes to jurisdiction and for that reason may be dealt with conveniently now.

It was conceded by counsel that if Curran J. had power to cancel the charge it must, on the facts, have been under either section 14(1) or section 34 of the Act of 1891. We know of no other possible source of jurisdiction that might have been invoked in this case and we consider this concession to have been properly made. That being so, we may turn at once to the enactments just mentioned.

Section 14(1) provides for an appeal from a registering authority. It says:

> "14 (1) Any person aggrieved by an order or decision of a registering authority may appeal to the court in the prescribed manner, and under the prescribed conditions, and the court may annul or confirm, with or without modification, the order or decision of the registering authority."

One of the prescribed conditions is that an appeal under this subsection is to be taken within ten days or such further period as shall be allowed for special cause. The respondent has made no attempt

to get such an extension and if his application is to be regarded as an appeal it is long out of time. We pass from this subsection, however, for another and less technical reason. Without making any attempt to define the precise scope of the subsection it is, we think, beyond question that it was not intended to provide a means of reviewing an act of an administrative type done by the registrar at the request or with the approval of all persons concerned therein or affected thereby. It predicates an order or decision that aggrieves someone. And even if the act of the registrar in registering the alleged charge at the request of both parties involved an order or decision within the meaning of section 14, it is difficult to see how either the appellant or the respondent can be placed within the category of persons aggrieved. They were both privy to the registration. They both wanted it, the one to perfect its security, the other to get his loan, and it would be stretching the right of appeal given by this subsection beyond all reason to hold that it could be exercised now by either of the parties to the instrument.

Section 34 offers more difficulty. Subsection (1) thereof, after providing that the register shall be conclusive evidence of the title of the owner and that such title shall not, in the absence of actual fraud, be affected by the owner having notice of any deed, document or matter relating to the land, proceeds:

> "....but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and any such court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

The only other part of this section which is material is the first part of subsection (2) which, as amended by section 32(6) of the Act of 1925, is in these terms:

> "34 (2) Where any error occurs in the registration of the ownership of land (whether of misstatement, misdescription, omission or otherwise, and whether in the register or in any map attached thereto), the Court, upon such application and in such manner as may be prescribed and after such notice, if any, as it may direct, may, if in the opinion of the Court such error can be corrected without loss or damage to any person, order such error to be corrected upon such terms as to costs or otherwise as it may think fit;...."

In our opinion subsection (1) of section 34 does not confer jurisdiction in this case. It makes plain that the conclusiveness of the register is not to interfere with the jurisdiction of a competent court based on the ground of actual fraud or mistake. Where such a jurisdiction exists the register is to conform with and not to control the order of the court. The word "mistake" is to be read as connoting the sort of mistake that enables the courts—apart altogether from the Act of 1891—to rectify or set aside an assurance. A mistake of law made by a registering authority in the course of his statutory duties, such as that alleged by the respondent, is not a mistake of that nature and we cannot regard subsection (1) as applying to it. We think the purport of this subsection is accurately stated by Madden J. in that part of his judgment in *In re Walsh*[1] where, sitting as Land Judge, he says: "The section leaves it open "to a Court of competent jurisdiction, in substantive proceedings, "to deal with a registered title on the ground of actual fraud, in "such manner as it thinks just, and to order the register to be recti- "fied accordingly, It contains a similar provision applicable to a "case where the instrument registered can be rectified on the ground "of common mistake, by substantive proceedings in a Court of "competent jurisdiction. In both these cases the rectification of the "register is made under the order, not of this Court, but of the "Court by which the case is heard."

We turn, then, to subsection (2) of section 34. The opening words of this subsection—"Where any error occurs" and "whether by "mistake, misdescription, omission or otherwise"—are very wide, and if not narrowed by the context they would, in our view, suffice to include the registration of a burden on the ownership due to a mistake of law of the kind which the respondent contends was made in this case. If the respondent is right, not only did the registering authority commit an error in entering the charge on the folio, but the entry itself manifests the error by its inclusion of the words "by way of demise." It would be strange indeed if the language of this subsection were not intended to include an error of that sort, for in the absence of any other way of putting the matter right that would be tantamount to perpetuating a mistake of law on the face of the register.

The difficulty, however, arises not on the earlier part of the subsection but on the limitation of the court's jurisdiction to correct the register, which is imposed by the later words "without loss or

[1] [1916] 1 I.R. 40, 45.

"damage to any person." The appellant might well be damnified by the order made by Curran J. and the immediate question, therefore, is whether that consideration takes the instant case out of subsection (2). If it does, there was, in our view, no jurisdiction to make the order appealed from. If it does not, the jurisdiction was ample.

In *In re Walsh*[1] Madden J. had substantially the same question to deal with, and in the course of a careful judgment, which contains a review of the previous decisions, he reached this conclusion[2]— "I am of opinion that this Court has jurisdiction under the 34th "section, where it is alleged that an error has occurred in the regis- "tration of any instrument or transaction, to decide, as between "the parties to the instrument or document, any question of law "or fact which may arise as to its construction or effect, subject to "review by the Court of Appeal, and then by rectification of the "register to bring it into conformity with the instrument or trans- "action which is the subject of registration, subject to this limita- "tion, that the power so conferred can only be exercised when the "error can be corrected without injury to any person other than "the parties to the instrument or transaction which is put on the "register." The same point arose and was decided by this court in *In re Alice Trainor*[3]. That case related to a Land Registry map which included a greater area than it should, and the argument was advanced that the registered owner of the holding to which the map related would suffer loss or damage if the rectification sought were granted. The opinion of the court was delivered in a brief judgment by Moore L.C.J. "Loss" was held to mean legal loss and the reasoning applied was that legal loss or damage cannot be suffered by a person who has something taken from him to which he was never entitled in law.

We are, of course, bound by the latter of these cases, but this is not to say that their reasoning, though differently expressed, is in conflict. Our opinion is that the decisions rest on the same foundation and that here, where we are still dealing with the parties to the instrument, they both justify the conclusion that section 34(2) gave Curran J. jurisdiction to embrace the respondent's application and to order as he did.

We accordingly return to the first of the two main questions already posed. Did the instrument create a valid charge capable of registration? Counsel for the appellant argued for an affirmative answer on two broad grounds—(1) that the demise was not a letting

1 [1916] 1 I.R. 40.
2 Ibid. 49.
3 [1936] N.I. 197.

within the meaning of section 30(1) of the Act of 1925; and (2) that even though the demise were a letting and void, the instrument manifested a clear intention to charge the lands and therefore created a valid and registrable charge.

In our opinion these contentions fail, and we hope we shall not be thought lacking in respect for the careful and elaborate manner in which they were presented if we deal with each of them shortly.

Submission (1) rested on the view, based on a survey of the Land and Land Purchase Acts, that "letting" means an occupational letting, that is to say a letting to an occupier of the holding let. This, it was admitted, would render the attornment under clause 9 of the instrument void, but, if sound, it would take the demise out of section 30(1). We have carefully considered this argument and can find nothing in the legislation cited in support of it which would justify its acceptance. Whether or not the instrument constituted a lease as defined by section 1 of Deasy's Act, the demise was a letting within the ordinary meaning of that term and there is nothing in the Act of 1925 that we can discern to give the word a narrower meaning.

Submission (2) depended on the severability of the demise and amounted to saying that the rest of the instrument sufficed to charge the land comprised in the folio. In our opinion it is impossible to sever the instrument in this way. The demise was plainly the basis of the document and the only manner in which the document purports to affect the land or to create a charge upon it is by way of the demise. The position, then, is that if, as we would hold, the demise is void by reason of section 30(1) of the 1925 Act, the whole instrument, in so far as it purports to affect the land or to create a charge upon it is ineffectual and void. Had the instrument been by way of transfer, or had the demise been validated by consent it may be that, notwithstanding its form and purport, the instrument might have constituted a registrable charge. That does not arise for decision on this appeal and we express no opinion upon it. The salient feature of the transaction now in question is that, in so far as it affects the respondent's land, the statute has made it null and void.

For these reasons we are of opinion that the order of Curran J. was right and that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors for the Society: *R. S. Neilson & Park.*

Solicitors for the registered owner: *D. & E. Fisher.*

J.P.

## MINISTER OF AGRICULTURE v. CARRAGHER No. 1[1]

*Emergency legislation—Importation of livestock—Seizure by authorised officer—Sale by authorised officer—Summons for forfeiture of animals—Agriculture (Miscellaneous War Provisions) Act*, 1940 (3 & 4 *Geo.* 6, *c.* 14), *s.* 28—*Livestock (Import from Eire and the Isle of Man) Regulations*, 1945 (*S.R. & O.* 1945, *No.* 942), *reg.* 5.

Regulation 5(4) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, made under section 28 of the Agriculture (Miscellaneous War Provisions) Act, 1940, provides for the bringing of proceedings at petty sessions for the forfeiture of animals seized under the Regulations "or the "proceeds of sale thereof, as the case may be."

An authorised officer seized, and on the same day sold, a number of pigs which he suspected had been illegally imported. In due course condemnation proceedings were brought claiming the forfeiture of the animals, and the summons was dismissed on the ground that it should have claimed the forfeiture of the proceeds of sale.

*Held*, that the words "as the case may be" in regulation 5(4) postulate two distinct and separate cases, and that consequently, a summons claiming the forfeiture of the animals was not appropriate when the animals had been sold.

CASE STATED by the Resident Magistrate sitting at Cookstown Petty Sessions.

On March 5, 1956, a constable of the Royal Ulster Constabulary, being an "authorised officer" within the meaning of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, seized a number of pigs which he found in a lorry near Dungannon. Afterwards on the same day he sold them to the Pigs Marketing Board, and in due course he received payment therefor which he lodged in the bank to the credit of the Ministry of Agriculture.

A seizure notice was duly displayed and, the respondent having claimed 16 of the pigs, he was served with a summons in the following terms: "....that on the 5th day of March, 1956, at Clare.... "certain livestock, to wit, 16 pigs, were found and were seized for "that they were imported from Eire into that part of the United "Kingdom called Northern Ireland, contrary to the provisions of the "Agriculture (Miscellaneous War Provisions) Act, 1945 (3 & 4 Geo. "6, c. 14) and the Statutory Rules and Orders made thereunder...., "whereby the said animals or the proceeds of sale thereof are liable "to forfeiture, and you the said defendant have claimed the said "animals under Article 5 of the said Regulations; AND that the "complainant applies for forfeiture of the said animals."

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: April 17, 1957.

The resident magistrate accepted the contention made on behalf of the respondent that, in circumstances where there had been an authorised sale, the only competent application for forfeiture must be in respect of the proceeds of sale and dismissed the summons. On the request of the Minister he stated this case for the opinion of the Court of Appeal as to whether he had been right in so holding.

*Nicholson Q.C.* and *McConnell* for the appellant.

*Stewart Q.C.* and *Doyle* for the respondent.

LORD MACDERMOTT L.C.J.: The question asked in this case stated raises once again the true construction of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, made under the Agriculture (Miscellaneous War Provisions) Act, 1940.

At Cookstown Petty Sessions held on November 23, 1956, the Minister of Agriculture sought the condemnation of 16 pigs which had been seized by an authorised officer near Dungannon on March 5, 1956. The seizure was effected on the ground that there was a reasonable suspicion that the animals had been illegally imported from Eire, and later on the same day the authorised officer sold them to the Pigs Marketing Board, a course of action which was, beyond any doubt, in due exercise of the power conferred by the 1945 Regulations with respect to seized livestock. Having seized the pigs, and exercised his power of sale, the officer then, in due compliance with paragraph 5(3) of the regulations, posted a seizure notice in consequence of which the defendant claimed, in accordance with paragraph 5(4), that the pigs were, at the time of the seizure, his property, and that they had not been illegally imported.

It then became incumbent on the Minister, under the latter part of paragraph 5(4), "as soon as practicable" to "apply....for an "Order that the animals or the proceeds of sale thereof, as the case "may be, be forfeited...." That part of the sub-paragraph is couched in mandatory terms, and the question for decision arises by reason of the fact that when the matter came to be dealt with by the learned resident magistrate, he had before him a summons claiming the forfeiture, not of the proceeds of sale, but of the animals. It seems likely that the form of the summons was the result of inadvertence, but however it happened, it has given rise to the question which this court is now called upon to decide, namely, whether the learned resident magistrate was correct in law in dismissing the claim for forfeiture.

It was contended on behalf of the defendant that the Regulations provide for the making of an application for one of two orders, and that those orders being distinct in nature and not alternative, a claim for the forfeiture of the animals could not be put forward in circumstances where the animals had been sold before the institution of the proceedings. It was submitted that, the only competent application being in respect of the proceeds of sale, the application for the forfeiture of the animals must fail. The learned resident magistrate accepted this submission and refused the order, holding that the proper application should have been for the forfeiture of the proceeds of sale.

For the complainant and appellant it was urged that whether or not there has been an actual sale, it is always open to the Minister to claim the forfeiture of the animals. Mr. Nicholson did not seek to question the correctness of the decision in *Minister of Agriculture v. Nugent*,[1] a case decided in the Queen's Bench Division before the jurisdiction was transferred to the Court of Appeal. I think there can be no doubt that it would be competent for this court to review that decision, but it was not in fact challenged, though some of the dicta were the subject of criticism.

In that case there was a seizure in accordance with the Regulations, but the subsequent sale was effected by a person other than the seizing officer. A summons was brought seeking the condemnation of the proceeds of sale and the decision of the court was that a summons in that form was appropriate only to the case where there had been a sale authorised under the regulations, that is, a sale by an authorised officer. It was held that the summons was not competent in the circumstances, in that it claimed the forfeiture of the proceeds of sale when in fact there had not been an authorised sale.

The effect of that decision was to hold that the words "proceeds "of sale" mean "proceeds of a sale as hereby authorised." The actual decision goes further than that, however, and clearly indicates a view of the true construction of the words "as the case may be." In the course of his judgment Black L.J. says[2]: "the natural and "indeed inevitable meaning of this phrase 'or the proceeds of sale " 'thereof as the case may be' appears to me to be the proceeds of "a sale such as paragraph 5 has been dealing with, namely where a "sale has been effected by the seizing officer under the power con- "ferred upon him by sub-paragraph (2) I think sub-paragraph (4)

[1] [1955] N.I. 58. [2] Ibid. 65, 66.

"must be taken as contemplating and dealing with circumstances "where what has been done has been done in accordance with the "earlier provisions of the Order."; and later[1]: "I cannot disregard "the words 'as the case may be' as meaningless. . . . . I must endeav- "our to give a reasonable and fair meaning to the words in their con- "text. The only effect which I can attach to these words 'as the case " 'may be' is that they postulate two distinct and separate cases and "indicate that a different application must be made according to "the nature of the particular case. If the animal has not been sold "by the seizing officer under the provisions of sub-paragraph (2) the "application which the Minister must make will be for the forfeiture "of the animal itself, whereas if the animal has been sold by the "seizing officer the application which he must make will be for the "forfeiture of the proceeds of the sale."

The first of those two instances is the same as that raised by the facts then under consideration, and the second covers the facts in this case. Black L.J. then continues[2]: "If my view as to the effect of "the words 'as the case may be' is correct, it will not do to bring "an application under these Regulations of 1945 for forfeiture of an "animal itself if it has been sold by the seizing officer, or for the "forfeiture of the proceeds of sale if he has not sold it."

Whether or not that reasoning went beyond what was necessary for the decision in *Nugent's* case[3] it is, in my view, sound. The regulation under consideration is a difficult one, and, as I pointed out in my concurring judgment in that case, the outcome was regrettable, turning as it did on a technicality and having nothing to do with the merits. On that occasion I expressed the hope that there would be some revision of the Regulations in the near future. However, nothing has so far been done in that direction, and dealing with the Regulations as they are, I can find no way past the reason- ing in the parts of the judgment of Black L.J. to which I have referred.

It seems to me, therefore, that in the present case, there having been an authorised sale, the provisions of paragraph 5(4) made it incumbent on the Minister to bring proceedings for the forfeiture, not of the animals, but of the proceeds of sale. I cannot read the words "as the case may be" as leaving room for the exercise of any option. One procedure or the other has to be adopted, and that being so, I am of opinion that the learned resident magistrate came to a correct conclusion.

[1] [1955] N.I. at 67.
[2] Ibid. 67.
[3] [1953] N.I. 58.

BLACK L.J.: I agree with what the Lord Chief Justice has said and having nothing to add except to reiterate again what has been so often said about these Regulations. Surely it is time, in view of their defects, that they were taken in hand and remoulded so as to set out in clear terms what the drafters of the Regulations intended the procedure to be.

CURRAN L.J.: I also agree with the judgment of the Lord Chief Justice and have nothing to add.

*Appeal dismissed.*

Solicitor for the appellant: *Chief Crown Solicitor.*
Solicitor for the respondent: *J. G. Lennon.*

S.M.M.

## MINISTER OF AGRICULTURE v. CARRAGHER No. 2[1].

*Emergency legislation—Importation of livestock—Seizure by authorised officer—Proceedings for forfeiture of proceeds of sale—Intermediary lacking power to act as selling agent—Validity of sale by authorised officer—Agriculture (Miscellaneous War Provisions) Act*, 1940 (3 & 4 *Geo.* 6, *c.* 14), *s.* 28—*Livestock (Import from Eire and the Isle of Man) Regulations*, 1945 (*S.R. & O.* 1945, *No.* 942), *reg.* 5.

An authorised officer seized certain pigs under the powers given by regulation 5(2) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, and dispatched them to the Pigs Marketing Board with directions to receive and sell them on his behalf. In due course the officer received a cheque for the value of the pigs, and condemnation proceedings having been brought for the forfeiture of the proceeds of sale, the resident magistrate made a forfeiture order. The defendant appealed to quarter sessions on the ground that there had not been a valid sale by the authorised officer as required by the regulations. The appeal succeeded, the county court judge holding that the Board had no power to act as selling agent, and that there was no evidence of a sale by the officer to the Board.

*Held*, that a person or body which has no power to act as selling agent may, nevertheless, be the means of bringing together a vendor and a purchaser in a valid contract, and that, a sale having in fact been completed, it was competent for the Minister to bring proceedings for the forfeiture of the proceeds of that sale.

CASE STATED by the County Court Judge of Armagh.

On September 29, 1955, an authorised officer seized 29 pigs which he found in a lorry near the Land Boundary in County Armagh and which he suspected of having been illegally imported. On the same day he despatched the pigs to Portadown in the care of another officer to whom he handed an envelope containing a written form of authority directed to the Pigs Marketing Board, requiring it to receive and sell the animals on his behalf, and to remit to him the net proceeds by crossed cheque, together with a statement of account. On October 10, 1955, the authorised officer received a cheque for £212 4s. 6d. from the Pigs Marketing Board, together with a document consisting of three pages, each in the form of a purchase docket divided into columns and containing details of weight and price. The net total was the amount sent by cheque to the authorised officer and accepted by him as being the proceeds of sale of the animals.

Subsequently the Minister brought proceedings at petty sessions under regulation 5(4) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, No. 942, for the forfeiture of the

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Nov. 5, 1957

proceeds of sale of the pigs, and the resident magistrate made a forfeiture order. The defendant then appealed to quarter sessions, and there questioned the jurisdiction to make an order for forfeiture of "the proceeds of sale" on the ground that there had been no valid sale by the authorised officer as required by the regulations. The county court judge held "that the Pigs Marketing Board had no "power to act on the seizing officer's direction to receive and sell "the pigs on his behalf and that on the contradictory evidence pre- "sented by the form of authority and the statement of account, it "was impossible to hold with the submission of a sale by the author- "ised officer to the Pigs Marketing Board." He then went on to hold that "accordingly there were no proceeds of sale within the "meaning of the Regulations." On the request of the Minister he stated this case for the opinion of the Court of Appeal.

*Nicholson Q.C.* and *McConnell* for the complainant and appellant. The procedure adopted by the seizing officer is not inconsistent with a sale by him to the Pigs Marketing Board. Such a sale would be invalid if the pigs were not produced in Northern Ireland but the respondent cannot be heard to say that, having based his claim on the assertion that they were not illegally imported. There is a presumption that pigs purchased by the Board were Northern Ireland pigs and the onus of showing that the sale was invalid is on the respondent.

It is admitted that the Board has no statutory power to act as a selling agent, but when regard is had to the reality of this transaction it clearly amounted to a sale. There is no element in this case such as there was in *McPherson v. Watt*[1], to render invalid the sale which actually took place. In that case, it is clear from the judgments that if the agent had disclosed that he was purchasing on his own behalf, the sale could not have been challenged. The real contract here was the offer by the Board to purchase, and the acceptance of that offer by the officer when he accepted the purchase money. The officer must be assumed to have known that the Board had no power to act as selling agent and that all along he contemplated the Board as purchaser. This was just as much a valid sale as that in *Minister of Agriculture v. Healey*[2].

*Stewart Q.C.* and *McDevitt* for the defendant and respondent. The admissions made by the appellant are sufficient to dispose of this case. So far as a sale to the Board is concerned the Crown cannot have it both ways: saying that the sale is valid because there is

[1] (1877) 3 App. Cas. 254. [2] [1956] N.I. 163.

a presumption that the pigs were produced in Northern Ireland and at the same time claiming the forfeiture of the proceeds of sale on the ground of illegal importation. The admission that the Board has no power to act as selling agent means, on analogy with company law, that the sale is wholly void as being ultra vires: see Palmer on Company Law, 13th ed., p. 266.

[LORD MACDERMOTT L.C.J. No one is attempting to enforce a contract of agency.]

The whole question is whether or not there has been a sale. There has been a conversion—the seizing officer started off with pigs and ended up with money—but that is very far short of saying that there has been a sale. In the absence of a valid sale by the seizing officer there can be no proceedings for forfeiture of proceeds of sale: *Minister of Agriculture v. Nugent*[1].

LORD MACDERMOTT L.C.J.: This case stated arises on a summons taken out by the Minister of Agriculture for Northern Ireland under the provisions of regulation 5(4) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, No. 942, following the seizure of twenty-nine pigs by an authorised officer on September 29, 1955. The proceedings thus initiated were for the forfeiture of the proceeds of sale of the animals which the authorised officer had purported to sell.

At petty sessions the resident magistrate made a forfeiture order as sought by the Minister. The defendant then appealed to quarter sessions, and there questioned the jurisdiction to make an order for forfeiture of "the proceeds of sale" on the ground that there had been no valid sale by the authorised officer as provided for in the Regulations.

From the finding at paragraph 3(a) of the case stated it appears that the authorised officer dispatched the pigs to Portadown, accompanied by a written form of authority signed by him and directed to the Pigs Marketing Board. That document is exhibited in the case stated, and its terms, which are important, are as follows:—
"Please receive and sell on my behalf the above-mentioned animals
"seized by me on 29th September, 1955. You will please remit nett
"proceeds by crossed cheque, together with statement of account,
"to me to the undermentioned address."

Then, at paragraph 3(b), there is a finding that the Pigs Marketing Board, on October 10, 1955, sent to the authorised officer a state-

[1] [1955] N.I. 58.

ment of account and a cheque for £212 4s. 6d. and a further finding that the authorised officer accepted this cheque as being the proceeds of sale of the animals. The actual document referred to in the finding as a "statement of account" is not so called on its face. It presumably got this name in the course of the proceedings, having been furnished in response to the authorised officer's request for a statement of account, and being that in fact. The three pages of the document are all in the form of a purchase docket, with columns for entry numbers, live and dead weight, paying grade, grade price per score, value and remarks. In the last column on this document —that is, the column headed "remarks"—are the words "seized "pigs." The total addition is carried forward on each page until a gross amount is reached, and therefrom is deducted a sum in respect of insurance and a contribution of two shillings per pig made under the Pigs Marketing Scheme. The net amount thus arrived at was the amount sent by cheque to the authorised officer, which was accepted by him, as the county court judge finds, as the proceeds of sale of the animals.

At the hearing at quarter sessions, Mr. Lennon, for the claimant, made a submission which is set out in the case stated as follows: "There was no valid sale of the seized animals and therefore no "proceeds of sale within the meaning of Article 5 of the Regulations "as the Pigs Marketing Board had no power to sell animals on "behalf of the seizing officer as directed by him." Mr. Lennon then referred to the Agricultural Marketing Act (Northern Ireland), 1933, the scheme set out in S.R. & O. 1933, No. 93, and the scheme now in force and set out in S.R. & O. 1954, No. 99. On behalf of the Minister, Mr. Wilson submitted that there had been a valid sale as the Board had power to carry out the authorised officer's direction by virtue of article 32 of S.R. & O. 1954, No. 99 and section 13(1) of the Agricultural Marketing Act (Northern Ireland), 1933. He then added an alternative argument which it is also important to note. He submitted that "the reality of the transaction" between the authorised officer and the Board was a sale by the officer to the Board which was concluded and made binding when the officer accepted the Board's cheque as the value of the pigs.

The county court judge, addressing himself to those arguments— which must have arisen on the evidence adduced to found the jurisdiction of the court—says in the case stated: "I held that the Pigs "Marketing Board had no power to act on the seizing officer's "direction to receive and sell the pigs on his behalf and that on the

"contradictory evidence presented by the form of authority referred "to at paragraph 3(a) and the statement of account referred to at "3(b) it was impossible for me to hold with the submission of a sale "by the authorised officer to the Pigs Marketing Board." Having reached these two findings the learned judge proceeds to a consequential finding, "that accordingly there were no proceeds of sale "within the meaning of the Regulations," and to hold that the application by the respondent for the forfeiture thereof should be refused. He then poses the question for the opinion of this court in general terms—"Whether I was right in law in so holding upon the "said submissions?"

Taking the second of these findings first, it seems to me that the county court judge was, on the evidence, fully justified in coming to the conclusion that there had been no sale by the authorised officer to the Board. As both sides realised, this was a question which had to be decided on the facts and circumstances of the transaction itself and with regard to its reality rather than to matters of form. Considering the terms of the document which accompanied the pigs to Portadown, it is difficult to view the transaction as anything but one in which the Board was to act as selling agent on behalf of the authorised officer. The second document, in form consisting of three purchase dockets with the name "Pigs Marketing Board "(Northern Ireland)" at the top, is in reality—and I find no difficulty in coming to this conclusion—a statement of account such as was asked for by the officer. I have no doubt that the prices set out in this statement represent what the Board got for the pigs by disposing of them to curers, for that appears to have been the only way, at all events in practice, in which the Board could realise them. Therefore I think the county court judge was right in coming to the conclusion, having regard to the documents, that there had not been a sale by the authorised officer to the Board.

With regard to the conclusion that the Board could not act as selling agent, I will assume, without expressing an opinion on this point, that the county court judge was right and that the Board has no such power.

The county court judge, however, then proceeds to the conclusion that there was no sale and therefore no proceeds of sale within the meaning of the Regulations, and this, in my opinion, is where he falls into error. A person or body which has no power to act as selling agent may nevertheless be the means of bringing together a seller and a purchaser in a valid contract. A sale resulting between

such seller and purchaser, at any rate in circumstances where the sale is actually completed—I am not speaking now of an executory sale—can be perfectly good in law. We were not referred to, nor am I aware of any authority for the proposition that where an intermediary turns out to be acting without power, any bargain made as a result of his intervention will be void. In my opinion that proposition cannot be supported.

That being so, it seems to me that the learned county court judge was wrong in law in concluding that the effect of his findings was that no valid sale had taken place. The documents clearly support the view that the reality of the transaction was a sale by the authorised officer to the actual purchasers, a firm or firms of bacon curers. The fact that the sale was brought about by the Board at the request of the authorised officer does not affect its validity or make the proceeds any less "proceeds of sale" within the meaning of the Regulations.

Accordingly I would answer the question submitted as follows:—

The learned county court judge was right in law in holding against the submission that there was a sale by the authorised officer to the Board, but was wrong in law in holding that there were no proceeds of sale within the meaning of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, the court being of opinion that, even if the Board had no power to act as agents for sale, the evidence showed that a sale had taken place between the authorised officer and those who dealt as purchasers with the Board, and that the purchase money produced by such sale was "proceeds of sale" within the meaning of the said Regulations.

BLACK L.J.: I agree and have nothing to add.

CURRAN L.J.: I also agree.

*Appeal allowed.*

Solicitor for the appellant: *Chief Crown Solicitor.*
Solicitor for the respondent: *J. G. Lennon.*

S.M.M.

## IN RE MURPHY: BOYD AND BRETT v. SIGGINS AND OTHERS[1].

*Vendor and purchaser—Trustees for sale—Power to invest in rents—Sale by way of sub-fee-farm grant or underlease—Reservation of profit rent—Validity of exercise of power of sale.*

Trustees for sale of land held on fee-farm grant or under long lease who have power under the trust instrument to invest in rents may realise any portion of the estate by the making of sub-fee-farm grants or underleases with the reservation of a profit rent.

ADJOURNED SUMMONS.

The testator died on March 16, 1943, possessed of a substantial estate consisting mainly of extensive house properties which were held in fee-farm or under long lease. By his will and codicils thereto the testator, after providing for certain legacies and annuities, devised and bequeathed his real and personal estate to his trustees on trust for his daughter for life with remainder to her children, subject to certain provisions set out in the will.

The estate comprised many dwelling-houses let on weekly, monthly or quarterly tenancies and subject to the Rent Restrictions Acts, and from time to time some of these houses became vacant. The trustees were advised, and were of the opinion, that it was in the best interest of the beneficiaries that such houses should not be let afresh but should be sold, and that each of the sales should be carried out by way of long lease or by sub-fee-farm grant (according to the tenure) at an appropriate ground rent and fine, and subject to the usual lessee's or grantee's covenants.

The trustees were given certain express powers by the will. These powers, omitting what is not material, were as follows. The powers are numbered for ease of reference, the numbers being those by which the powers were referred to in the judgment of the Lord Chief Justice:

> (1) "....my trustees shall sell call in collect and convert into "money the said real and personal property at such time or "times and in such manner as they shall think fit....with power "to postpone the sale calling in or conversion of the whole or "any part or parts of the said property....as they shall think "proper and to retain the same or any part thereof in its present "form of investment without being responsible for loss."

[1] In the Chancery Division before Lord MacDermott L.C.J.: May 10, July 26, 1957.

(2) "My trustees shall at their discretion invest the residue "of the said moneys....in or upon any of the investments "hereby authorised with power to vary or transpose such invest- "ments for or into others of a nature hereby authorised that is "to say my trustees may at such discretion as aforesaid invest "the said trust moneys in the purchase of or at interest upon the "security of such freehold leasehold or chattel real property or "stocks funds shares securities or other investments of whatso- "ever nature and wheresoever and whether involving liability "or not or upon such personal credit with or without security "as my trustees shall in their absolute discretion think fit to the "intent that my trustees shall have the same full and unrestricted "powers of investing and transposing investments in all respects "as if they were absolutely entitled thereto beneficially...."

(3) Power to—"manage and superintend the management of "the trust premises....and accept or concur in accepting sur- "renders of leases and tenancies....and generally to deal or "concur in dealing with the premises as they might do if they "were absolute owners thereof without being responsible for "any loss or damage which may happen thereby."

(4) Power to—"make grants for ever or leases for any term "of years of any portion of the premises to any person or persons "who shall improve the same by erecting or building thereon "any new houses erections or buildings or by rebuilding repair- "ing enlarging or improving any houses erections or buildings "then standing thereon or shall covenant or agree so to do "within two years after the date of such grants or leases so as "there be reserved the best yearly rent or rents that can be "reasonably got with the option of taking a fine or premium."

The question raised by this summons was whether under the powers conferred by the will of the testator and by the Trustee Act, 1893, or otherwise, the trustees were "entitled to grant sub-fee-farm "grants, or sub-leases for long terms of years, of any portion of the "real or chattel real estate, subject to the trusts of the said will and "codicils, in consideration of fines to be paid by the grantees or "lessees, and rents to be reserved which would in the aggregate "exceed the head-rent payable under the fee-farm grant or lease by "which such portion of the said estate is held by the plantiffs as "such trustees."

Mr. Alexander Purse Murdoch, the trustees' estate agent, swore an affidavit in which he deposed as follows:

"I have found, in my experience as an estate agent, that the "reservation to a vendor of a small annual rent does not materi- "ally affect the purchase price of the property, which is obtain- "able by way of a fine, and it is my opinion that in Belfast and "in respect of the houses and property the subject of these pro- "ceedings, the most profitable way of effecting sales is by the "method to which I have referred."

*Gibson Q.C.* and *Shaw* for the trustees. This summons really raises two points: (a) the meaning of a power of sale in the light of *In re Judd and Poland and Skelcher's Contract*[1]; and (b) the effect thereon of certain additional powers conferred by the will under consideration. There can be no doubt that the trustees have a general power of sale. It is quite clear that the making of sub-fee-farm grants or underleases, in consideration of fines and apportioned rents, may be a valid exercise of powers of sale: *In re Webb*[2] and *In re Judd and Poland and Skelcher's Contract*.[1]. A transaction which is in substance a sale will be so regarded even though not strictly so called. The two cases cited dealt with the creation of underleases as a conveyancing expedient for carrying out a sale of properties held under one lease. They were followed in *Alexander v. Clarke*[3] where, as in the present case, the making of sub-fee-farm grants was also contemplated. In that case the decision was influenced by the fact that the rents reserved were, apparently, to be disposed of immediately. *In re Braithwaite's Settled Estates*[4], a Northern Ireland decision, is not exactly this case either, as there was no question of reserving a profit rent. In a recent case in Eire, however, it was held that a transaction by way of underlease could be a sale in substance, notwithstanding the reservation of a profit rent: *Sims-Clarke v. Ilet Ltd.*[5]. The question there related to costs, but the facts, as appears from the judgment, approximate very closely to those of the present case.

It may be that some assistance may be obtained from the wording of section 40(1) of the Administration of Estates Act (Northern Ireland), 1955, which clearly recognises the conveyancing expedient of making sub-fee-farm grants and sub-leases by personal representatives.

It is also to be noted that the will contains express powers to postpone the sale or conversion of any part or parts of the property, and to retain property as at present invested. A sale in the manner

[1] [1906] 1 Ch. 684.
[2] [1897] 1 Ch. 144.
[3] [1920] 1 I.R. 47.
[4] [1922] 1 I.R. 71.
[5] [1953] I.R. 39.

proposed might well be within these powers when combined with the general power of sale. It is clear that the trustees have very wide powers of investment under this will. A trustee having power "to "invest in the purchase of land....can purchase freehold ground "rents": Laws of England (Hailsham ed.) vol. 33, paragraph 421: Williams on Vendor and Purchaser, 4th edition, p. 322.

*Blair* for the remaindermen.

*Hutton* for the life tenant.

*Cur. adv. vult.*

LORD MACDERMOTT L.C.J. stated the facts substantially as set out above and continued: This question raises a matter of general importance in this jurisdiction where land is commonly held on long lease or fee-farm grant, and where alienation by way of sub-lease or sub-fee-farm grant is a matter of everyday practice. I have no hesitation in accepting the evidence given by Mr. Murdoch to the effect that it would be in the interests of the beneficiaries to have the vacant dwellings disposed of by the method which he has described, namely, by giving purchasers a long sub-lease or sub-fee-farm grant, as the case may be, in consideration of an appropriate ground rent and the payment of a fine. The question is whether the trustees have power in law to follow that method.

At this point it must be emphasised that if the trustees have such power they propose to exercise it as and when houses become vacant and opportunity arises to act on the advice they have received. There is no question here of dividing a specific parcel of property into suitable smaller parcels and disposing of each of the latter by way of sub-grant or sub-lease as a conveyancing expedient for disposing of the entirety. Here, we are dealing with the odd house which falls vacant on a large estate, and what the trustees want to do cannot fairly be described as a means of disposing of the entirety. Conditions may change. The entirety may never be disposed of by the methods which are now profitable. The question posed must therefore be considered in relation to the odd house that has become vacant and available for sale, and not in relation to the whole estate or to such parts thereof as are held under different titles.

Moreover, it is also to be remarked that the rent to be reserved by the trustees in the form of transaction which they now propose is not fixed as a proportionate part of the head rent to which the house for disposal is, with other premises, subject. The intention is that as the proposed sales proceed the rents reserved thereon will,

in the aggregate, exceed the head rent payable in respect of the grant or lease under which the houses sold are held. It may, therefore, be taken that there is a profit element in the rents proposed to be charged, but the general design of disposal has not, so far, provided for the realisation of these rents.

I must now return to the express powers conferred upon the trustees. Of these (1) is in wide terms, but it remains a trust for sale and does not afford a plain answer to the question under consideration. (2) contains a comprehensive power of investment and all I need say of it now is that, in my opinion, it authorises investment in rents reserved by long leases and fee-farm grants, whether sub-leases or sub-grants or not: see *In re Peyton's Settlement Trust*[1]. (3) is a power of management. Read literally, it empowers the trustees to act as absolute owners, but I do not think this should be construed as authorising any form of alienation open to an absolute owner. I think this power must be confined to matters of management and, so read, it does not give the trustees the power they now seek. (4) is also in very wide terms, but in my view it does not help the trustees on this occasion. It provides for the making of grants or leases, with the option of taking a fine, but the power seems clearly restricted to cases in which the trustees put the grantees or lessees under an obligation to improve the land, as by building thereon or rebuilding, enlarging or repairing existing buildings.

So far, then, as the express powers are concerned we are left with —(1) the trust for sale and (2) the power of investment, to the extent to which it may affect the matter in hand. To these should be added a reference to the power conferred upon the trustees by section 13(1) of the Trustee Act, 1893, which, omitting what is not material, says:

> "Where a trust for sale or a power of sale of property is
> "vested in a trustee, he may sell or concur with any other
> "person in selling all or any part of the property....either
> "together or in lots, by public auction or by private contract,
> "subject to any such conditions respecting title or evidence of
> "title or other matter as the trustee thinks fit...."

Before going further it will be convenient to note several points that may be taken as settled and that will help to narrow the issue if mentioned now.

In the first place it is clear, beyond question, that the trustees can sell in parcels or lots, such as single houses. There is no obligation on them to sell together all that is comprised in one title. This is

[1] (1869) L.R. 7 Eq. 463.

plain from the terms of the trust for sale and section 13(1) of the Act of 1893.

Secondly, a mere power of sale will not normally import a power to alienate the property in question for some lesser interest than that held. For example, if A holds Blackacre in fee simple upon trust for sale, this does not empower A to lease for a long term of years.

But thirdly, what is essentially a sale, that is to say, what is substantially an alienation of the interest held, may be carried out by vesting in the purchaser an interest which is technically less if that is a proper conveyancing expedient for completing the transaction. The limits of this proposition have not been very precisely defined and I must now turn to the principal decisions on which it is founded.

In *In re Webb*[1], part of the property held under a lease was sold by auction subject to a condition that the purchaser should accept an underlease for the unexpired term less three days at an apportioned ground rent. The question for decision was whether the vendor's solicitor was entitled to a further scale charge in respect of the rent. Stirling J. held that he was not on the ground that the transaction, though in the form of an underlease, was in fact a sale, and in the course of his judgment he said this: "Then, is it a lease? "In a sense, no doubt, it is a lease, but in truth it is a sale. It is "described as a sale in the conditions of sale, and it is so described "in the plaintiffs' bill of costs. It is a sale carried out by an under-"lease, which is a well-known conveyancer's expedient, where the "property sold is held with other property under one lease, to avoid "an apportionment of the rent, about which there might be a diffi-"culty with the superior landlord."

Then in *In re Judd and Poland and Skelcher's Contract*[2], the Court of Appeal in England held, overruling the decision of Kekewich J. in *In re Walker and Oakshott's Contract*[3], that trustees for sale who had sold some but not all of the houses held under a single lease could validly exercise their trust for sale by granting subleases of the houses sold at apportioned rents. Romer L.J. said[4]: "I may take it that an underlease in substance is not justified, but "where an underlease is a pure matter of a conveyancer's expedient, "a method of conveyancing for carrying out a sale, then I cannot "see that there is any valid objection to it, especially as I have "pointed out that this conveyancer's expedient is the best known "method of carrying out such a sale, and the best for the trust

1 [1897] 1 Ch. 144, 149.
2 [1906] 1 Ch. 684.
3 [1901] 2 Ch. 383.
4 [1906] 1 Ch. at 690.

"estate." Then Cozens-Hardy L.J. said[1]: ".... I think it is a fallacy "to say, because trustees for sale are not authorised to grant a lease, "that they have not power in a case like this to carry out the sale "by means of that which is a mere piece of machinery, viz., the "grant of an underlease with a nominal reversion, which is some- "thing wholly distinct from what I have, in the course of the argu- "ment, ventured to call a real underlease."

In *Alexander v. Clarke*[2], the matter was considered in this country by O'Connor M.R. In that case the trustees were trustees for sale with a power of leasing for any term of years at such rent and subject to such covenants as they should think fit. It appears that much of the trust estate was held, as here, under fee farm grants and long leases and the question submitted to the court on behalf of the plaintiff, the surviving trustee, was in very similar terms to that which I have to consider in these proceedings. In the course of his argument for the plaintiff Mr. Charles Murphy conceded that a trustee for sale had no implied power of leasing but that the trustee in that case had an unlimited power of leasing, and he submitted that "the plaintiff can combine these two powers, and do what is "asked for in the summons." As here, what was proposed was to carry out the sale of certain houses by granting the purchasers subgrants or sub-leases for long terms in consideration of fines and rents which would, in the aggregate, exceed the head rent payable under the grant or lease by which the property was held and thus create a profit rent, which could also be sold. The Master of the Rolls was satisfied that this mode of sale was the most advantageous for the trust estate and he then addressed himself to the question whether it was authorised by the trust. He said[3]: "It has been "decided that the ordinary trust for sale does not authorise a mere "lease, and so it may be said that the making of a sub-fee-farm "grant or lease is in itself not a sale; but the substance of the con- "templated transaction must be considered rather than the form." Then, after a reference to section 13 of the Act of 1893, he considered the judgment of Kekewich J. in *In re Walker and Oakshott's Contract*[4] and passed from that to the judgments of the Court of Appeal in *In re Judd and Poland and Skelcher's Contract*[5]. These, he thought, covered the case before him. "The object of the trustee," he said[6], "is to dispose absolutely of the entire estate of the testator. He does "not propose to make sub-fee-farm grants or sub-leases for the

1 Ibid. 691
2 [1920] 1 I.R. 47.
3 Ibid. 49.
4 [1901] 2 Ch. 383.
5 [1906] 1 Ch. 684.
6 [1920] 1 I.R. at 51.

"purpose of retaining rents for the trust estate. No doubt, he will "carve out sub-interests, but so far as the trust estate is concerned, "these will have only a momentary existence, because the rents "reserved will also be disposed of. Further, there will not be any "liability cast on the trust estate."

The facts of *Alexander v. Clarke*[1], take the Master of the Rolls' decision somewhat further than the decision in *In re Judd and Poland and Skelcher's Contract*[2]. In the latter case no question of a profit rent arose as the rents reserved were apportioned parts of the head rent. In the case before the Master of the Rolls the proposal, as here, was to reserve rents exceeding in the aggregate the head rent. But then—and here so far as I can gather from the report of *Alexander v. Clarke*[1] is where the similarity between that case and the present ends—the profit rents were to be sold. The Master of the Rolls concludes his description of the proposal before him in the first paragraph of his judgment by saying ".....and thus create a profit-"rent, which could also be sold." That seems vague, but later, when he is applying the decision of the Court of Appeal in England, he apparently takes it for granted that the profit rents will only be held by the trustees for the purposes of realisation because he says ".....so far as the trust estate is concerned, these will only have a "momentary existence, because the rents reserved will also be dis-"posed of." I therefore think it must be assumed that the Master of the Rolls proceeded on the basis that the scheme which was before him was a scheme for the complete realisation of the estate with any profit rent arising out of the disposal of the houses being sold as well as the houses. It may be observed that the head-note of this case refers to the trustee for sale having an unlimited power of leasing, but I would not gather from the terms of the judgment that this circumstance was one of its foundations. In the present case there is no suggestion as to when the profit rents which it is proposed to create will be sold, and I think I must proceed on the assumption that no immediate realisation is intended and that, until some occasion arises to indicate a different course, the trustees will be content to hold such profit rents as part of the estate and to apply them as income thereof.

In *In re Braithwaite's Settled Estate*[3], Wilson J. held that a tenant for life, selling lands held under a fee-farm grant in exercise of the powers conferred by the Settled Land Acts, could sell in lots and carry out the sales by making sub-fee-farm grants or long leases to

[1] [1920] 1 I.R. 47.
[2] [1906] 1 Ch. 684.
[3] [1922] 1 I.R. 71.

the respective purchasers. The decision only is reported, but it is clear from the argument of Mr. Megaw, for the tenants for life, that it was an application of the principle enunciated in *In re Judd and Poland and Skelcher's Contract*[1], and it is to be noted that the proposal before the court was different from that in *Alexander v. Clarke*[2], and in the present case, as the rents to be reserved on the sales of the lots were to be such as would amount to the rents reserved by the respective head fee-farm grants.

In the High Court of Eire, in *Sims-Clarke v. Ilet Ltd.*[3], Dixon J. had to consider the nature of a transaction for the purchase of a portion of leasehold premises, to be carried out by an underlease for the residue of the term save the last day thereof. The question arose on a dispute as to costs and was resolved by a finding that the transaction was really a sale carried out by way of underlease. The learned judge thought the decision in *In re Webb*[4] ruled the matter and pointed out that the only possible distinction between that case and the case he was considering was that in the latter the rent reserved was such that, having regard to the other property contained in the head lease, there was a profit rent. Though this decision was as between vendor and purchaser, the point arose, as I have said, on a question of costs and not on a question of title. The vendors seem to have been under no restriction such as might affect trustees for sale, and for that reason the case has not a direct bearing on the matter I have to determine.

Now it seems to me that the current of authority comes near the present case without quite reaching it. I do not think the power of the trustees can be tested merely by asking what people would call the type of transaction they propose. What they propose may well be spoken of, in common parlance, as a sale, for the testator's interest, under that proposal, would pass substantially to the purchaser. But none of the cases raising a question of title regards that as conclusive in itself. They all rely, in addition, on being able to describe the vehicle of completion, the sub-grant or the sub-lease, as a conveyancing expedient for carrying out the sale. They show that this description will apply where what is sold is part of what is held at a head rent and completion is by a sub-grant or sub-lease at an apportioned rent. And *Alexander v. Clarke*[2], as I understand it, goes on to say that this description of a conveyancing expedient will still apply where the sub-rents exceed the head rent so as to

[1] [1906] 1 Ch. 684.
[2] [1920] 1 I.R. 47.
[3] [1953] I.R. 39.
[4] [1897] 1 Ch. 144.

create a profit rent, *if the scheme of realisation provides, not for the keeping of the profit rent, but for its sale as well.*

The facts of the present case are different in an important respect. The intention, no doubt, includes the eventual covering of the head rents, but it goes beyond that. The proposed transactions are provident and in the interests of the trust because they will each produce a profit in the rent as well as a price that will not suffer on account of that profit element. The reality of that sort of transaction seems to me to be that the trustees will get, and get to keep at their discretion, two things for every house sold—(1) the price, and (2) an investment in the shape of a long-term or perpetuity rent. Now I am unable to see how a power or trust for sale, without more, can authorise the acquisition or holding of such an investment. Take the case of trustees with a trust for sale of five houses held under one title, and with a power of investment limited to government stock. If they hold in fee simple it is difficult to see how they could sell each house by fee-farm grant or long lease for a fine and a rent. Not only would such a course not be called for as a conveyancing expedient, but the trustees would have no power to invest in land. If, however, they themselves held in fee-farm or for a long term at a rent of, say, £10 there is no doubt that they could sell, at any rate four of the houses, for a fine and a sub-rent of £2 each. That would be a proper and recognised way of proceeding to realise the entirety. But suppose the houses can only be sold as they fall vacant and there can be no settled scheme of selling the entirety, how could the trustees sell for a fine and, say a £5 rent? Ex hypothesi, they have not the power to change from one form of landed property into another.

And so, if the trustees here had no power to put the proceeds of realisation into anything but stocks and shares, I would conclude that they had not power to do what they propose. But in fact they have power to invest in rents. Does this justify a different answer to the question posed? In my opinion it does. What they propose is (a) to use a method of alienation that is justified by the title under which they hold, (b) to dispose, not of the entirety of the testator's interest, but of such a substantial part thereof as to warrant describing the transaction as a sale, and (c) to retain what remains of that interest for the time being as an authorised investment.

I see no sound reason why the trustees should not do that. It is a sensible way of realising what can be realised, it is beneficial to the trust estate and, as I read this will, it is authorised by the joint effect

of the trust for sale and the power of investment. In short, what they propose is to carry out what is, in substance, a sale by what, in view of the title and their powers of investment, can fairly be regarded as a proper conveyancing expedient.

I would therefore answer the question submitted in the affirmative, the term sub-fee-farm grant being, of course, related to property held under grant and the trustees remaining under an obligation to consider each sale on its merits and in the light of prevailing conditions.

*Declaration accordingly.*

Solicitors for the trustees: *Geo. L. MacLaine & Co.*
Solicitors for the remaindermen: *McKinty & Wright.*
Solicitor for the life tenant: *Ivan Montgomery.*

S.M.M.

## IN RE NORTHERN BANK LTD.[1]

*Company—Alteration of constitution—Substitution of memorandum and articles for deed of co-partnership—Company formed before* 1862 *but registered under the Companies Act*, 1862—*Companies Act* (*Northern Ireland*), 1932 (22 & 23 *Geo.* 5, *c.* 7), *ss.* 273, 276, 289.

A joint stock company formed before 1862 and first registered as a limited company under the Companies Act, 1862, may exercise the power conferred by section 289(1) of the Companies Act (Northern Ireland), 1932, to substitute a memorandum and articles for a deed of settlement, even though such a company is debarred from registering under the Act of 1932.

*In re Sherborne Gas & Coke Co. Ltd.* [1936] W.N. 20 applied.

PETITION for the confirmation of a special resolution of the petitioning company, whereby it was proposed that a memorandum and articles be substituted for the company's articles of co-partnership and all subsequent regulations of the company.

The petitioning company was established as a joint stock banking company by a deed of co-partnership dated August 1, 1824. It was first registered under the Companies Acts 1862 to 1880 on September 1, 1883. The company resolved by special resolution to substitute a memorandum and articles of association for its deed of co-partnership and all regulations subsequently made and petitioned the court for an order confirming the proposed alteration, submitting that it was empowered to make the said substitution by virtue of section 273 of the Companies Act (Northern Ireland), 1932[2].

*Harrison Q.C.* and *Chambers* for the petitioning company.

*Patton Q.C.* for the shareholders' committee.

*Cur. adv. vult.*

[1] In the Chancery Division before McVeigh J.: Feb. 11, 26, 1957.

[2] Companies Act (Northern Ireland), 1932, s. 273: "This Act shall apply "to every company registered but "not formed under the Joint Stock "Companies Acts, the Companies "Act, 1862, or the Companies (Con-"solidation) Act, 1908, in the same "manner as it is in Part IX of this "Act declared to apply to companies "registered but not formed under "this Act:...."
S. 276(1): "With the exceptions and "subject to the provisions contained "in this section (a) any company "consisting of seven or more mem-"bers, which was in existence on the "second day of November, eighteen "hundred and sixty-two....may at "any time register under this Act "....Provided that—(i) a company "registered under the Companies "Act, 1862, or the Companies (Con-"solidation) Act, 1908, shall not "register in pursuance of this sec-"tion:...."
S. 289(1): "Subject to the provisions "of this section, a company registered "in pursuance of this Part of this "Act may by special resolution alter "the form of its constitution by sub-"stituting a memorandum and articles "for a deed of settlement."

McVeigh J.: This comes before me by way of petition for confirmation of an alteration in the form of the constitution of the petitioners, the Northern Bank Limited. In the present case the facts are that the company was originally established as a joint stock banking company with the title Northern Banking Company by a deed of co-partnership dated August 1, 1824. The company was therefore formed prior to 1862. It was first registered under the Companies Acts 1862-1880 on September 1, 1883, as a limited company, and was thus a company registered pursuant to the provisions of the Companies Act, 1862 (as amended). The alteration proposed by the special resolution passed by the Company is to substitute a memorandum and articles of association for the petitioners' articles of co-partnership dated August 1, 1824, and all regulations of the petitioners subsequently made. It is submitted that this can be done pursuant to the terms of section 289 Companies Act (Northern Ireland), 1932.

[His Lordship read the terms of section 289 and continued]: It will be seen that section 289(1) refers to "a company registered in "pursuance of this Part of this Act...." The words "this Part of "this Act" clearly refer to Part IX which begins at s. 276 and the title whereof is "Companies not formed under this Act authorised "to register under this Act." Companies authorised by section 276(1) to register under the 1932 Act are, inter alia, companies in existence on November 2, 1862. The proviso (i) to section 276(1) enacts that a company registered under the Companies Act, 1862, or the Companies (Consolidation) Act, 1908, shall not register in pursuance of this section.

One might be excused for thinking that the result of these provisions is that a company which was registered either under the 1862 Act or the 1908 Act and could not therefore be registered under the provisions of section 276 of the 1932 Act was debarred from obtaining the benefit of section 289 of the 1932 Act. This was not, however, the view taken of similar sections in the English Companies Act of 1929.

In the case of *In re Sherborne Gas & Coke Co. Ltd.*[1], it appears that the said company was established by a deed of settlement dated May 20, 1836, and was registered under the Companies Act, 1862, as an unlimited company. The deed of settlement was altered from time to time and was in December, 1909, superseded, except so far as it related to the objects of the Company, by articles of association.

[1] [1936] W.N. 20.

In January, 1910, the company was registered under Part VII of the Companies Consolidation Act, 1908, as a company limited by shares, and the word "Limited" was added to the company's name. By a special resolution duly passed in August, 1935, in accordance with section 117 Companies Act, 1929, it was resolved to take similar action as is proposed in the present case and a petition was presented to the court for confirmation of the alteration proposed. The question arose whether in view of the fact that the company was not a company registered in pursuance of Part IX of the Companies Act, 1929, the petition could be sanctioned. Bennett J. took the view that under section 317 of the Act of 1929, a company registered under the Act of 1908 though not formed under that Statute, having a deed of settlement and not a memorandum of association, was enabled by virtue of section 334 of the Act of 1929, if it satisfied the requirements of section 5 of that Statute, to substitute for the deed of settlement a memorandum and articles of association, although it was not a company registered in pursuance in Part IX of the Act of 1929. The corresponding sections of the Companies Act (Northern Ireland), 1932, to those cited above are as follows, the English section being in brackets:—

S. 5 (5), S. 273 (317), S. 289 (334).

It seems therefore that in the opinion of Bennett J. section 317 of the English Act provided the key to this problem, and I set out here the corresponding section 273 of the Companies Act (Northern Ireland), 1932:

> "This Act shall apply to every company registered but not "formed under the Joint Stock Companies Acts, the Companies "Act, 1862, or the Companies (Consolidation) Act, 1908, in the "same manner as it is in Part IX of this Act declared to apply to "companies registered but not formed under this Act."

This section appears in Part VIII of the Act under the heading "Application of Act to companies formed or registered under former "Acts."

Accordingly, it would appear that Bennett J. held that as the Sherborne Gas Company Limited was registered, though not formed, under the Act of 1862 as an unlimited company and under the Act of 1908 as a limited company, it was a company to which the whole Companies Act applied, including Part IX, in the same manner as the Act is in Part IX declared to apply to companies registered but not formed under the Act, and thus that section 334 (English), or section 289 (Northern Ireland) as the case may be, applies to such a com-

pany. This appears to be the view also taken in the more modern edition of Palmer's Company Precedents, Part I, General Forms, 15th ed. (1938) at p. 1126 where one finds it stated that:

"S. 334 is confined to companies formed before 1862...."

Also at p. 1126 one finds: "A company formed after 1862 with a "deed of settlement registered under the Acts of 1862-1907 falls "under s. 5 rather than under s. 334. *Re Hewitt Bros. Ltd.*"[1]

and at p. 1127: "the section" (i.e. 334) "applies where a company "has been registered under the Act of 1862—*Re Sherborne Gas "& Coke Co. Ltd.*"[2]

However, it does not appear that the authors of Gore-Browne on Companies, 39th ed. (1936) are prepared to be quite so positive, for at p. 45 one finds it stated as follows:

"A company which cannot register under the Act by reason "of the proviso to section 321, and which is constituted by "Deed of Settlement, cannot take advantage of the procedure "laid down in section 334 for the purpose of substituting a "Memorandum and Articles for a Deed of Settlement. The "same result can, however, be obtained by passing a special "resolution under section 117 and applying to the Court by "petition under section 5. *Hewitt Bros. Ltd.*[1]. *Sherborne Gas & "Coke Company.*"[2]

On the other hand, the passage contained in Halsbury's Laws of England (Simonds ed.) Vol. 6, p. 90, supports the view expressed by Bennett J.; the passage is as follows:

"A company registered under the Joint Stock Companies "Act, 1856, the Companies Act, 1862, the Companies (Con- "solidation) Act, 1908, or the Companies Act, 1929, may.... "substitute a memorandum and articles for its deed of settle- "ment, even though it has not re-registered or is debarred from "re-registering under the Companies Act, 1948, and therefore "does not fall directly within the scope of the provision here- "inbefore set out." (i.e. section 395 of the 1948 Act correspond- ing to section 334 of the 1929 Act).

The case of *In re Hewitt Brothers Limited*,[1] is somewhat difficult to understand. It was there submitted *by the petitioners* that section 334 was inapplicable because the company had been registered under the Companies Acts, 1862 and 1886 and therefore came within proviso (i) to section 321(1) which is similar to proviso (i) to section

[1] [1931] W.N. 213. [2] [1936] W.N. 20.

276(1) Companies Act (Northern Ireland), 1932. It was, however, submitted that the case came under section 5 and the application was granted under that section.

As will be seen from the facts set out earlier, the company in the present case was not one which could register under section 276(1) of the Companies Act (Northern Ireland), 1932, having regard to proviso (i), having already registered under 1862 Act, just as the Sherborne Gas & Coke Company was not one which could register having regard to section 321(1) proviso (i) of the 1929 Act in England, having already registered under the 1908 Act.

I have decided to follow the principle of the decision in the *Sherborne* case[1], supported as it is by the views expressed in Palmer's Company Precedents and in Halsbury's Laws of England (Simonds ed.).

It would indeed be strange if companies which were formed prior to November 2, 1862, and which were registered under the Act of 1862 or 1908 were debarred from obtaining the benefits of section 289 of the 1932 Act, whilst other companies, also formed prior to 1862, but registered under the Act of 1932, could obtain the benefits of the said Section; the needs of such companies to modernise their constitutions would in most cases be equal and yet it would be a most unsatisfactory result if the Act of 1932 prevented one group from modernising and permitted the other to do so. Such a construction would not readily be given to the Act, and I think the key to the matter is section 273.

I had not the advantage in this case of having any contest on the question of jurisdiction; the petitioners were contending that the matter fell within the provisions of section 289, and Mr. Patton, who appeared for the shareholders' committee, supported this argument. It is helpful to know, however, that the shareholders' committee have been taken into consultation at all stages of this matter and fully support the petition, and nobody has appeared to object to it. Apart from this, I am satisfied that the application is one which should be granted if jurisdiction exists to do so. I have indicated already that I think such jurisdiction exists, and I accordingly make the order asked, namely, confirming the proposed alteration in the constitution of the Company.

It is of interest to see that this kind of point arose under the Companies (Memorandum of Association) Act, 1890, that is as to whether a company formed and registered under the Joint Stock

[1] [1936] W.N. 20.

Companies Acts, 1856 and 1857, could apply for confirmation of an alteration of its Memorandum under the Companies (Memorandum of Association) Act, 1890. The matter can be found decided in *In re Euphrates & Tigris Steam Navigation Company Ltd.*[1], and in that case the previous decisions are set out and attention called to the differences of opinion that existed. Although there are probably not many companies which would wish to take advantage of section 289 of the 1932 Act, nevertheless it would be useful to have it made clear in any future statutes to what companies precisely the provisions of the present section 289 apply, and I commend this, perhaps, small point to the Company Law Committee for its consideration.

*Order accordingly.*

Solicitor for the petitioning company: *F. Lindsay Ringland.*

Solicitors for the shareholders' committee: *J. C. Taylor & Co.*

J.P.

[1] [1904] 1 Ch. 360.

# IN RE LIVINGSTONE; IN RE MICHAEL; IN RE CROMIE[1].

*Commissioners for oaths—Appointment of justice of the peace as commissioner.*

NOTE

Three persons severally made application before the Lord Chief Justice to be appointed commissioners for oaths for various petty sessions districts. The Lord Chief Justice was satisfied that each was personally suitable and that the need for an appointment in each district had been shown, but his Lordship refused to make the appointments sought on the ground that each of the applicants was a justice of the peace, and as such was bound to administer certain oaths without fee; and though an undertaking, such as had been accepted in *In re Elliot*,[2] was offered on behalf of each applicant his Lordship considered that, because of the difficulty of defining and enforcing such an undertaking, the appointment of justices to be commissioners was as a general rule undesirable, although there might in exceptional cases be circumstances which would justify such an appointment.

J.P.

1 In the Supreme Court of Judi[illegible] in Northern Ireland b[illegible]
2 Dermott L.C.J.: April 26, May [illegible] 1957.
(1901) 2 N.I.J.R. [illegible]

## MORROW v. CARTY[1].

*Contract—Specific performance—Sale of house by auction—Deposit to be paid immediately after sale—Contract signed—Time allowed to purchaser to produce deposit—Resale—Subsequent tender of deposit by cheque—Purchaser's claim to specific performance—Effect of allowing purchaser time—Equitable estoppel.*

On the sale of a bungalow by public auction it was a condition of sale that the deposit should be paid "immediately after the sale." The bungalow was knocked down to the plaintiff who, after signing the agreement, stated his inability to pay the deposit immediately. He was thereupon given an hour to produce the deposit. After the lapse of an hour, the plaintiff not having returned, the bungalow was resold to another person. Later the plaintiff returned and tendered a cheque for the deposit, but the cheque was refused and he was told that the bungalow had been resold to another. In this action the plaintiff claimed specific performance of his original contract, or alternatively, specific performance of his contract as rectified in relation to the condition concerning the payment of the deposit.

*Held*, (i) that the term in the conditions of sale relating to the payment of a deposit required a payment in cash, and as this condition had not been waived, the plaintiff had not shown that he was ready and willing to perform his obligation and was accordingly, in any event, not entitled to specific performance; nor did the fact that, according to the plaintiff's case, the defendants had by effecting a resale repudiated the contract exonerate the plaintiff from establishing that he was ready and willing to perform the contract;

(ii) that the concession made to the plaintiff to produce the deposit within an hour was a mere indulgence which did not attract the doctrine of estoppel; there was no estoppel at common law since there was no representation of existing fact, and the doctrine of equitable estoppel could not be invoked since the statement made to the plaintiff did not cause him to alter his position to his detriment, and therefore even if the plaintiff had returned with a proper deposit before the expiration of the hour he would not be entitled to the remedy sought.

*Quaere*, whether in any circumstances the doctrine of equitable estoppel can be invoked where a promisee is seeking to enforce rights against the promisor.

ACTION by a purchaser for specific performance of the sale of a bungalow, and counterclaim by the vendor for damages for breach of contract.

The facts of the case and the arguments of counsel appear sufficiently in the judgment of McVeigh J.

*Lowry Q.C.* and *MacDermott* for the plaintiff.
*Harrison Q.C.* and *Higgins* for the defendant.

*Cur. adv. vult.*

[1] In the Chancery Division before McVeigh J.: March 14, 15, 19, 20, 21; July 2, 1957.

McVEIGH J.: This is an action by the plaintiff, Andrew Morrow, for specific performance of an agreement dated February 4, 1956, in respect of the sale of a bungalow situate in Cookstown in the County of Tyrone.

This bungalow was "knocked down" to the plaintiff, he being the highest bidder, but due to his failure to produce the deposit and fees within a limited time the bungalow was resold and out of this arises the present action.

The sale of this bungalow took place on the said February 4, 1956, which was a Saturday. It was advertised to take place at 2.30 p.m., but as to when it actually started and finished there is disagreement between the various witnesses who were called to give evidence. It is unfortunate that in this case, where so much now turns on questions of time, one has so much disagreement, but this is perhaps explained to some extent by the fact that when the various events were occurring on February 4, 1956, time did not appear to be as important a factor as it ultimately became in this case. The sale was held on a Saturday afternoon and was, as I have said, so advertised, and in addition the advertisement stated that the deposit was to be paid "at time of sale." Most property sales are held in Cookstown on a Saturday and this day is the early closing day for the banks, thus no banks are open in Cookstown on Saturday afternoons. The auctioneer gave evidence that the usual practice is that the deposit fees are paid at the time of the sale, that is to say at the time of signing the agreement. The conditions of sale, which were read out at the auction before bidding began, provided in condition 4 that the deposit and fees were to be paid to vendor's solicitor "immediately after the sale." It was stated by the auctioneer that there are occasions when the payment of deposit and fees is not insisted on at the time of sale, but in such cases he said one would have to be satisfied that the purchaser was solvent and would be able to pay later, and if not so satisfied one would insist on payment or treat the contract as gone. The evidence which exists in this case as to the credit of the plaintiff is, that he lived at Kiltyclogher near Cookstown with his stepfather and mother, that he had no house of his own (and was presently living in lodgings). He assisted his stepfather on the farm and also sold poultry spice and oil; he was not a man of substance, and nobody attempted to describe him as such; indeed, as it turned out, he did not produce the deposit at the time of or immediately after the sale as required by the advertisement and conditions of sale, and would not have

been able to do so unless given time which, although he did not reveal this to the vendor's solicitor or the auctioneer, he proposed to use in bringing about the sale of his stepfather's farm and thereby to obtain sufficient money to discharge the deposit and the auction fees. It was due entirely to the plaintiff's failure, as I hold it to be, to comply with the terms of the advertisement and conditions of sale, and indeed with what was the normal practice at such sales, that the present situation has been brought about. The evidence indeed reveals that the plaintiff was well aware that he would be bound to produce the deposit and fees as soon as the auction was over and the contract was signed. He never says in his evidence that he did not know that the deposit and fees would be required after the sale, and all he does say on this point is that when he asked the amount of these items and was told same, he indicated that he "would have to go home" for the money. He stated that he had some money with him, but "not as much as would pay full deposit," or again, "I hadn't enough with me." The amount of money he had was later stated to be £100 but he never offered this sum or any sum to the vendor or his solicitor.

It might be convenient to notice here that one of the points made in argument on behalf of the plaintiff was that the words "immedi-"ately after the sale" in paragraph 4 of the conditions of sale were wide enough, by reason of what was alleged to be local practice, to include payment at any time on the day of the sale or on the following Monday. I reject any such argument based on local practice because I do not think there is any such practice, and my view, on the evidence, is that the local practice is to pay deposit "then "and there" at conclusion of sale. It was further argued that a qualification should be given to the word "immediately" as would include the time taken by this plaintiff to produce the cheque which he ultimately obtained, and it is contended that some such words as "with as much convenient speed as may be" would be adequate to produce this effect. For such a qualification I was referred to *Thompson v. Gibson*[1], where the words under construction were "immediately afterwards" and were contained in a statute; but, it is important to note that Alderson B. in that case seems to favour the meaning of those words as being "within such convenient time "as is requisite for doing the thing," and Rolfe B. thought that the phrase meant "with all convenient speed"; he also pointed out that in strict construction the phrase excludes the lapse of any interval

[1] (1841) 8 M. & W. 282, 286.

of time. I was also referred to *In re Todd and M'Fadden's Contract*[1], where Kenny J. held that the same phrase in conditions of sale as to delivery of abstract of title meant "forthwith," "instanter," but it is argued by plaintiff's counsel that Kenny J's. observation following that indicates that he thought this could mean a delay of two days. I do not read his observation as such. The delay in the delivery of abstract in that case was five days and the judge was merely saying that the purchaser's solicitor might well have expected the abstract at the latest in two days, but that technically he was entitled to require it "instanter."

There can be little doubt that the payment of a deposit is a most important matter in the sale of land, and everybody knows this. As Lord Macnaghten says in *Soper v. Arnold*[2], "The deposit serves two "purposes—if the purchase is carried out it goes against the purchase-"money—but its primary purpose is this, it is a guarantee that the "purchaser means business; and if there is a case in which a deposit "is rightly and properly forfeited it is, I think, when a man enters "into a contract to buy real property without taking the trouble to "consider whether he can pay for it or not." My view is that the words "immediately after the sale" in condition 4 meant "without "any delay": see Shorter Oxford English Dictionary, 2nd ed.; and see Stroud's Judicial Dictionary, 3rd ed., vol. 2. I think it means that the purchaser must place himself at the disposal of the vendor or his agent so that it may be ensured that payment of the deposit takes place as soon as it is convenient to bring that about after the sale.

In the construction of this phrase the case of *Johnston v. Boyes*[3], is in point where it was held that what is required is payment in *cash* (not cheque) and that the vendor is not obliged to wait until the next day to enable the purchaser to produce cash even where the purchaser is a person of credit.

As will be seen later the plaintiff, even after he went away and returned, did not produce cash, but only a cheque drawn in favour of his stepfather, which he, the plaintiff, had endorsed, claiming that he had authority to do so. This in itself raises a point, namely, whether the eventual offer of a cheque is a sufficient compliance with the condition that any one seeking performance must have been ready and willing to perform the contract according to its terms. Now, I hold on the authority of *Johnston v. Boyes*[3] that condition 4 required payment of cash, and I hold also that this

[1] [1908] 1 I.R. 213.
[2] (1889) 14 App. Cas. 429, 435.
[3] [1899] 2 Ch. 73.

condition was not waived at any time. The position was that at the time this cheque was offered the property had been resold and no question accordingly arose as to whether the cheque was an adequate method of payment. The plaintiff now contends in paragraph 3 of the statement of claim that he was then and is now ready and willing to perform his obligations under the agreement, but as I hold that the obligation under condition 4 was not waived, and was not complied with because cash was not offered, the question arises as to whether the plaintiff was "ready" to comply with the contract. It is necessary for the plaintiff to plead that he is ready and willing to carry out the contract. See Halsbury's Laws of England, 2nd ed. vol. 31, p. 421, and *Ellis v. Rogers*[1]. In the case of *Cort v. Ambergate Railway*[2] Campbell C.J. said: "In common sense the meaning of such "an averment of readiness and willingness (by plaintiffs) must be that "the non completion of the contract was not the fault of the plain- "tiffs, and that they were disposed and able to complete it if it had "not been renounced by the defendants."

The plaintiff in this case was not, in my opinion, "ready," even within the time which he alleges was given to him to get the deposit, to perform his obligation to pay the deposit in cash. This obligation was, in my view, an essential term of the contract, and indeed the words of Lord Macnaghten already quoted in *Soper v. Arnold*[3] recognise it as such, and condition 18 providing for forfeiture of deposit and resale in default of compliance with conditions lends weight to this being considered an essential term: see *Harold Wood Brick Co. v. Ferris*[4].

I accordingly hold that his failure to perform this obligation or show that he was ready to perform it at the critical time disentitles him to specific performance. The repudiation of the contract by the defendant did not, in my view, excuse the plaintiff from showing performance or readiness to perform at the material time: see Halsbury's Laws of England, 2nd ed., vol. 31, p. 384; Chitty on Contract, 20th ed., p. 399; *Dyster v. Randall*[5]; Fry on Specific Performance, 6th ed. p. 436. I do not think that the plaintiff could have any legitimate ground of complaint if the case was decided against him on this ground for in my view it was somewhat audacious of him, in the way he was placed, to bid for this bungalow; he had not the money to pay the deposit, or any means, so far as the evidence goes, of obtaining any on his own credit, he was not in a

[1] (1884) 29 Ch.D. 661, 667.
[2] (1851) 17 Q.B. 127, 144.
[3] (1889) 14 App. Cas. 429.
[4] [1935] 2 K.B. 198, 205.
[5] [1926] Ch. 932, 934.

position to draw a cheque as he had no bank account, he was not entitled to assume that a cheque would be accepted and as the banks were closed he must have known that no facilities were available for cashing one. Furthermore, although he alleged that the sale of his stepfather's farm had reached an advanced stage it had not been concluded; his evidence as to this was that on Friday, February 3, (i.e., day before sale of bungalow) the negotiations had reached the stage that one John Joseph Irwin was to get this farm if the plaintiff succeeded in buying the bungalow the next day, i.e., February 4. If this is correct it is somewhat remarkable that no arrangement at all was made that the buyer of the farm should have been available at the scene of the auction or at some convenient place. Accordingly, when the sale of the bungalow was concluded, and time was given to the plaintiff to get the deposit he had to start searching for the said John Joseph Irwin. It is not even clear that the arrangement he made with John Joseph Irwin was that John Joseph Irwin was to get the farm only if Morrow got the bungalow. This version is corroborated to some extent, but with qualifications, by Edmund Irwin, the brother of John Joseph Irwin, whereas John Joseph Irwin says that he was to get the farm whether the plaintiff got the bungalow or not; he adds, however, "he did not have the agreement signed until he "(Morrow) would know if he would buy bungalow next day or not." The matter on the evidence was left in this inconclusive way between these parties.

[His Lordship then considered the evidence given on behalf of the parties concerning the contract of sale. The plaintiff's case was that immediately after the auction, and before he had signed the conditions of sale, he told the auctioneer and the defendant's solicitor that he had practically sold his stepfather's farm, and would have to go home to get the money to pay the deposit on the bungalow; that he then signed the conditions of sale and left, stating that he would return in about an hour to pay the deposit; that he returned within the hour, having meanwhile sold the farm; and that when he returned with a cheque to pay the deposit he found that the bungalow had been resold; that he was not told and did not understand that he was required to be back within an hour, but he thought he could pay the deposit at any time on the day of the sale.

His Lordship found that the plaintiff had not said anything about being unable to pay the deposit until after the contract had been signed; that he had not mentioned his stepfather's farm before leaving to get the money for the deposit; that he had been granted an hour and no more to get the deposit; and that the bungalow had

not been resold before the hour had elapsed. His Lordship then continued:]

Having regard to the decisions I have arrived at on the questions of fact it is not necessary for me to decide the various interesting questions of law raised and discussed before me, and in particular the claim for rectification contained in the amended statement of claim. I should, however, perhaps state my views on some of the propositions argued and at the outset I would point out that counsel for the defendant abandoned the plea of the Statute of Frauds. If I had to decide the claim for rectification my mind would be that the evidence does not satisfy me beyond all reasonable doubt as to what were the words to be substituted for "immediately" in paragraph 4 of the conditions of sale: *Rose v. Pim, Jun. & Co. Ltd.*[1]

As to the plea of equitable estoppel based on the allowance of an hour to get the deposit I have held as a fact that the plaintiff did not return within the time given and that the property was not resold until after the time given had elapsed; however, I propose to consider the implications of this plea.

I have already pointed out that Mr. Sally, the defendant's solicitor, stated in evidence that he regarded himself as in honour and legally bound not to sell under one hour. I doubt very much if that interpretation by him of the position would bind the vendor, for it is a matter for the court to decide what was the effect of the transaction. For myself I would have considered that the concession given was a mere indulgence. It was argued that the words used went beyond indulgence and constituted (a) a common law estoppel; or (b) an equitable or quasi estoppel. On the findings made by me it does not affect my decision even if I was to hold that any such estoppel existed, because I have held that the concession given was one hour, and no more, and I have further held that the plaintiff did not return within the time given nor was the property resold until after an hour had elapsed. However, assuming the necessary facts were found in favour of the plaintiff I am of opinion that this could not be a case of common law estoppel for it was not a representation of an existing fact: *Lyle-Meller v. A. Lewis & Co. Ltd.* per Denning L.J.[2] and Cheshire and Fifoot, 4th ed. 78. On the other hand, do the facts of this case bring it within the principle of equitable estoppel? This principle has been recently considered by the House of Lords in *Tool Metal Manufacturing Company v. Tungsten Electric Com-*

[1953] 2 All E.R. 739, 744, 747. [1956] 1 All E.R. 247, 250.

*pany*[1]. The principle as stated by Bowen L.J. in an earlier case, namely, *Birmingham & District Land Co. v. London & N.W. Rly. Co.*[2], and as accepted by the Lord Chancellor, is stated as follows: "It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before." The Lord Chancellor points out[3] "that the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this, because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights, and I do not wish to lend the authority of this House to the statement of the principle which is to be found in *Combe v. Combe*[4]. See also Lord Cohen's speech in the *Tool Metal Manufacturing Company v. Tungsten Electric Company*[5]. It seems reasonably clear, and is so stated by Lord Simonds, that the principle only applies when one party has led the other to alter his position. This element of the matter is noted in Cheshire and Fifoot, 4th ed. p. 81.

In my opinion nothing was done in this case by the vendor's solicitor or by the vendor to cause the plaintiff to alter his position to his detriment. The matter as I see it is simply stated in this way—the plaintiff asked for time to go home and get the money for the deposit and this was permitted—it was, in my view, merely an indulgence and not a case of equitable estoppel. I cannot see how allowing a person to go home to get money which he should have had with him causes that person to alter his position within the meaning of the principle of equitable estoppel.

I am quite satisfied that the plaintiff said nothing to Mr. Sally about the sale of his stepfather's farm and that Mr. Sally was not present or did not hear the reference to this sale which was made by plaintiff to the auctioneer. The first Mr. Sally knew of the sale was when he was told after the plaintiff had left Mr. Sally's office for the first time. Indeed, it is important to note that the auctioneer, to whom the sale was mentioned, did not think that plaintiff was depending on that sale to obtain the deposit on the bungalow pur-

1 [1955] 2 All E.R. 657.
2 (1888) 40 Ch.D. 268, 286.
3 [1955] 2 All E.R. at 660.
4 [1951] 1 All E.R. at 770.
5 [1955] 2 All E.R. at 685, 686.

chase, and the plaintiff had not even explained this to the auctioneer. Where the principle of equitable estoppel has been applied is in cases where the promisor knew or ought to have known that the promisee was on foot of, or on the faith of, the representation altering his position to his detriment. I would think it a somewhat remarkable application of the principle if it were to be used in a case where one party refrains from telling the other the true position, then comes into court and says you allowed me to alter my position to my prejudice. It may be that such could be the case where the act of the promisee was one which could have been reasonably contemplated as being done by him on foot of the promise, but in my view no vendor applying reasonable foresight would think that a purchaser who asked for time to go home and get the deposit on a sale, and who was to be back in a limited period such as an hour, was contemplating carrying through a sale of property in order to obtain the deposit. Again, I do not think that the failure of the plaintiff to mention to Mr. Sally that he had to carry through the sale of his stepfather's farm was mere inadvertence; had he mentioned this fact it might very well, as he in my opinion well knew, have prejudiced his request for the indulgence he asked. This conduct of his was lacking in frankness and candour and the expression he used, that he would have to go home and get the deposit, was to say the least misleading. In these circumstances can he be heard to invoke the aid of equity? The principle is only allowed in where it would be "unjust" to allow a party to insist on his strict legal rights—see per Denning L.J. in *Combe v. Combe*[1]. The same idea had been expressed much earlier by Lord Cairns in *Hughes v. Metropolitan Railway Co.*[2], where he points out that Courts of Equity will interfere "where it would be inequitable *having regard* "*to the dealings* which have thus taken place between the parties." I emphasise the words "having regard to the dealings.... between "the parties." The cited passage is referred to by Lindley L.J. and by Bowen L.J. in *Birmingham & District Land Co. v. London & N.W. Railway Co.*[3]. The promise in *Hughes v. Metropolitan Railway Co.*[2] was held to be one which induced the defendants to believe that they need not carry out repairs, and when subsequently the plaintiff relied on failure to repair within a period of six months as a ground of forfeiture the court relieved the defendant by applying the principle of equitable estoppel. If one looks at the speech of Lord Blackburn[4] one sees that he is impressed by the fact that the defendant

[1] [1951] 1 All E.R. 767 at 769.
[2] (1877) 2 App. Cas. 439 at 448.
[3] (1880) 40 Ch.D. 268, 281, 286.
[4] (1877) 2 App. Cas. at 453.

was induced to refrain from acting and this was to his detriment, it was also to the *advantage* of the plaintiff. In the present case there was no element of advantage to the defendant, although this may not necessarily be required for the principle to work; indeed I must say I agree with counsel for the defendant when he contended that the concession given was to enable the plaintiff to improve his position; there was no advantage, so far as I can see, to the defendant other than the chance, and it was no more than that, that the plaintiff would carry out the obligations which he had already undertaken. I should perhaps add also that I was by no means satisfied that the plaintiff was not going to sell his stepfather's farm if he did not get the bungalow, and he has not satisfied me that he suffered any detriment in that matter. My opinion on this aspect of the case is that the concession given was

(a) a mere indulgence and not such as to attract the doctrine of equitable estoppel;

(b) if it was more than that then in my view the plaintiff by the course of dealing between the parties has not earned the benefit of equity.

There is a further point which I should perhaps mention which could only arise if the property had been resold in repudiation of the promise. This point is based on the argument that the equitable doctrine can only be used as a shield and not as a sword: see Birkett L.J. in *Combe v. Combe*[1]. It is to be used as a defence against the party who, having led the other party to suppose that a strict legal right would not be enforced, then proceeds to enforce it: see *Hughes v. Metropolitan Railway Co.*[2], and Bowen L.J. in the *Birmingham & District Land Co.* case[3]. See also Cheshire and Fifoot on Contract, 4th ed. p. 81. It seems to be quite clear from the cases that a promisee cannot sue on the promise. It is the promisee who is here suing, and, as I see it and on the case made in the correspondence, the promisee (i.e., the plaintiff) cannot succeed unless he establishes the promise, thus it seems that he is using the promise as a sword rather than as a shield. It may be as Denning L.J. says in *Combe v. Combe*[4], that sometimes it is a plaintiff who is not allowed to insist on his strict legal rights and sometimes it is a defendant; the principle appears to be that the promisor is not to be allowed to enforce his strict rights where that involves repudiation of the promise or is inconsistent with it. Here the promisor is not enforcing his rights by

1 [1951] 1 All E.R. 767, 772.
2 (1877) 2 App. Cas. 439 at 448.
3 (1880) 40 Ch.D. 268, 286.
4 [1951] 1 All E.R. 767 at 769, 770.

bringing an action. Nor does it seem that the promise is being used as a defence, but rather for offence and it may be that such debars the plaintiff from relief. The matter does not appear to be clearly decided and I refrain from expressing an opinion on this point. The text in Cheshire and Fifoot 4th ed. pp. 81, 82, suggests that the use of the principle is confined to cases where the promisee is repelling an attack. Interesting discussions of this doctrine of equitable estoppel can be found in the Law Quarterly Review, vol. 67, p. 330, and vol. 72, p. 162, and it seems that there is still room for authoritative decision on certain points.

Accordingly, I dismiss the action with costs against the plaintiff; I dismiss the counterclaim without costs.

*Action and counterclaim dismissed.*

Solicitors for the plaintiff: *S. J. Miller & Shearer.*
Solicitors for the defendant: *Corr & Sally.*

J.P.

# ULSTER CHEMISTS LTD. v. HEMSBOROUGH INVESTMENT CO. LTD. BROWN v. SAME[1].

*Practice—Statutory appeal—Questions of fact involved—Form of hearing of appeal—Rehearing of evidence—Business Tenancies (Temporary Provisions) Act (Northern Ireland)*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 2), *s.* 9(3)—*R.S.C., Or.* 59*A, r.* 4*A.*

*Business tenancy—Application for renewal—Fixing of rent—Business Tenancies (Temporary Provisions) Act (Northern Ireland)*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 2), *s.* 2.

Section 2 of the Business Tenancies (Temporary Provisions) Act (Northern Ireland), 1952, provides that the tenant of business premises to which the Act applies may apply to the county court for a renewal of his tenancy, and that on such application the court may, subject to the provisions of the Act, grant a renewal "at such rent....as the court, having regard to all "the circumstances....may fix."

Section 9(3) of the Act provides that "any person who considers he is "aggrieved by a decision of the county court under this Act may in accord-"ance with rules of court appeal to the Supreme Court against such "decision."

Order 59A of the Rules of the Supreme Court applies to appeals to the Supreme Court "not otherwise provided for," and by rule 4A thereof "when any question of fact is involved....the evidence bearing on such "question shall be given orally, unless the Court or Judge, as respects that "evidence, or any part thereof, otherwise directs."

*Held*, (i) the right of appeal given by section 9(3) of the Act is not limited to appeals on a point of law only but applies to appeals on questions of fact;

(ii) that appeals brought pursuant to Order 59A in which questions of fact are involved take the form of a rehearing similar to an ordinary civil bill appeal;

(iii) that in determining the rent to be fixed pursuant to section 2(2) of the Act of 1952 the court may in its discretion allow a discount from what it finds to be the market value rent of the premises, having regard to the length of the term of the renewal; and that such discount, if any, will depend largely on the element of inflation due to scarcity of premises.

*Semble* that cases decided on the English Act—the Leasehold Property (Temporary Provisions) Act, 1951, afford guidance to a court administering the Northern Ireland Act of 1952.

STATUTORY APPEALS from decisions of the Recorder of Belfast on the hearing of two applications under the Business Premises (Temporary Provisions) Act (Northern Ireland), 1952. The two appeals were heard together by consent.

[1] In the Supreme Court of Judicature before McVeigh J.: May 15, 16, 17, June 7, 1957.

The tenants of two shops situate in North Street, Belfast, and held of the same landlords applied to the Recorder of Belfast for the renewal of their tenancies. The Recorder granted a renewal in each case for five years at rents of £580 and £545 respectively. The landlords being dissatisfied with these rents appealed to the Supreme Court.

At the beginning of the hearing of the appeal a preliminary point was raised as to the form of the hearing.

*Nicholson Q.C.* and *McConnell* for the landlords submitted that the appeal should take the form of a full rehearing of the evidence. They referred to the terms of Order 59A, rule 4A, and to *Belfast Corporation v. Goldring*[1].

*Stewart Q.C.* and *Appleton* for the tenants contended that the appeal was limited to an appeal on points of law and should be determined on the evidence taken in the court below, which was noted in the written judgment of the Recorder, in the same manner as an appeal from the High Court to the Court of Appeal is determined on the judge's note. They referred to the terms of Order 59A, rule 7, and Order 58, and to *Colonial Securities Trust Co. Ltd. v. Massey*[2] and *Re Chennell*[3].

McVeigh J.: I do not think that the case of *Belfast Corporation v. Goldring*[1] necessarily determines the point raised in the present case, because the appeal in that case was brought under a different statute, and there were certain matters in that statute to indicate that the appeal should take the form of a full re-hearing, such as is had in the case of a civil bill appeal. Nevertheless, there is some similarity in principle between the present appeals and that in *Goldring's* case[1], and it may be that that decision affords some guidance on the point raised before me.

The appeals in this case are brought under the provisions of section 9(3) of the Business Tenancies (Temporary Provisions) Act (Northern Ireland), 1952, the terms of which are as follows:

> "Any person who considers he is aggrieved by a decision of "the county court under this Act may in accordance with rules "of court appeal to the Supreme Court against such decision."

Now there is nothing contained in that section to limit the right of appeal to an appeal on a point of law only; in my view, the section leaves the way open for appeals as to questions of fact as well as upon points of law. If these present appeals were concerned only

[1] [1954] N.I. 107.
[2] [1896] 1 Q.B. 38.
[3] [1877] 8 Ch.D. 492.

with a point of law, it might have been necessary to determine which party should begin, but since the appeal relates to questions of fact as well as of law, it is not necessary to deal with that matter at present.

These appeals are brought under the provisions of Order 59A of the Rules of the Supreme Court, and it seems to me that where there is an appeal brought under that Order which involves a question of fact, the Order is designed to provide for an oral re-hearing, that is a re-hearing of the evidence as it was heard below. Such an appeal is common enough and well-known to these courts, for it is the ordinary form of appeal from the decision of a county court judge—and that, in substance, is what the present appeal is; accordingly, there is nothing novel involved in holding as I do that this appeal should take the form of a full re-hearing of the evidence.

In view of the fact that the parties are ready to proceed, I do not think I should reserve my decision on this preliminary point.

The appeals then continued.

*Stewart Q.C.* and *Appleton.* The rent to be fixed by the court under section 2(2) of the 1952 Act is something less than the market value. If the Legislature had intended that the rent should be the market value rent it would have used words such as those contained in the English Landlord and Tenant Act, 1927, section 5(2). The rent should be something between the market value rent and the former rent at which the premises were let: see *John Kay Ltd. v. Kay*, per Evershed M.R. and Jenkins L.J.[1]. That was a decision under the English Leasehold Property (Temporary Provisions) Act, 1951, and although the wording of the Northern Ireland Act of 1952 is different the two Acts are in pari materia, and the same reasoning is applicable to the present case as was applied in *John Kay Ltd. v. Kay*[1].

*Nicholson Q.C.* and *McConnell.* The English Act of 1951 is different from the Northern Ireland Act of 1952. The former provides only for a very limited period of renewal, namely twelve months, as against the period of up to five years in the latter. Moreover, the court in England is empowered to fix the rent which it considers "reasonable in all the circumstances," but those words do not appear in the 1952 Act. The court in Northern Ireland must, of course, act reasonably, but its discretion is more limited, and the court here should fix the rent at the market value rent, unless it is shown that to do so would expose the tenant to a form of extortion,

1 [1952] 2 Q.B. 258, 266-7, 277.

by reason of the shortage of accommodation in that area in which the premises are situate. Any reduction of rent allowed should take into account the length of the term of the renewal.

*Cur. adv. vult.*

McVeigh J.: These two matters come before me by way of appeal under section 9(3) of the Business Tenancies (Temporary Provisions) Act (Northern Ireland), 1952 (hereinafter called "the Act") from decisions of His Honour the Recorder of Belfast whereby he ordered that the tenancy in each case be renewed for the period of five years from February 11, 1957, and in the case of Joseph Brown he fixed the rent at £580 and in that of Ulster Chemists Ltd. at £545. The appeals were by agreement of the parties heard together. The appellants in each case are the landlords of the premises and they were the respondents in the application before the learned Recorder; they were the Hemsborough Investment Co. Ltd. being, as I was informed, a company registered in London; in this judgment I refer to them as "the respondents."

The appellant, Joseph Brown, is the tenant of 38 North Street in which he carried on a men's outfitting business. He held the premises under a lease for ten years from February 1, 1947, at a yearly rent of £400 payable quarterly with a covenant to do the inside repairs. Prior to this lease the rent was £200 per annum and the poor law valuation was £134 which, upon general revaluation, was increased to £300. The premises let to this tenant consist of the ground floor only. The frontage of the premises is 14 feet 9 inches and has a 10 feet 9 inches shop front and 4 feet entrance. The first 35 feet 6 inches of depth is the retail shop, the next 12 feet 6 inches is a fitting room and the remainder 4 feet 7 inches is toilet accommodation. The width of the building at the rere is 8 feet 6 inches and not 8 feet as stated by Mr. McAllister in his evidence before the Recorder.

The premises of Ulster Chemists Ltd. are situate at No. 40A North Street and are also confined to the ground floor; they have a narrow frontage of 11 feet with a shop front 7 feet 5 inches wide and an entrance 3 feet 9 inches wide which abuts on the separate entrance to the upper floors. The premises are held on a lease for ten years from April 15, 1947, at the annual rent of £450 with covenants to keep the premises in repair. The old poor law valuation was £110 and the new valuation is £260. The first 23 feet of depth is retail shop and remainder is dispensary, stockroom, office and toilet. The narrow width limits trading to small goods.

[His Lordship then reviewed the evidence given by three valuers who had been called to give evidence. Each of the valuers had adopted the "zoning method" and had used for purposes of comparison the rents at which adjacent premises in North Street had been let. The "zoning method" zones the ground floor into three depths—the first zone, and most valuable, being the first 15 feet of depth; the second zone being the next 15 feet of depth, and was valued by each valuer at one half the price of the first zone; the third zone was the remainder of the depth and was valued at one half the price of the second zone. In the light of this evidence His Lordship concluded that the calculated market rents of No. 38 North Street was £610 per annum, and that of No. 40A was £575 per annum. His Lordship then continued:]

I agree with the criticism of the learned Recorder as to the use of the method of averaging the rental value over the total area of shop premises because the floor space next the street is highest in value whilst the lowest in value lies at the rear of the shop. As shops vary considerably in depth and in shape, and some have much larger back areas than others, the overall price per square foot would not, in many cases, be an appropriate method, but I think it may be used in these cases to afford a reasonable guide. It was urged upon me that the rent fixed by the court should be below the market rent and I was referred to the case of *John Kay Ltd. v. Kay*[1]; and for the tenants I was referred particularly to the passage from the judgment of the Master of the Rolls and which appears in the learned Recorder's judgment and is as follows: "I am so far confining myself "to saying that, as I construe the Act, if the evidence justifies it, a "judge may conclude that the reasonable rent is a figure which is "neither the rent, on the one hand, which the tenant previously "paid, nor the market value rent which the landlord has shown that "he is able to obtain; but is some other figure in between the rent "hitherto payable and the rent in fact obtainable, being the rent "which the judge thinks is reasonable in all the circumstances of "the case."[2] I might also refer to the passage in the judgment of Jenkins L.J. where he says: "It is manifest that the object of this "enactment was to protect sitting tenants, as they are called, at the "end of their leases from being faced with the choice between the "disturbance caused by removing their business to some other "premises, if they could find any, and being compelled to pay an "inflated rent for their existing premises. That clearly was the state

[1] [1952] 2 Q.B. 258. [2] Ibid. 267.

"of affairs which the legislature set out to deal with, and, in my "view, to meet that state of affairs it was necessary that the court "should be given the greatest latitude in determining what would "be a reasonable rent. If the only power the court had was to as- "certain and fix the open market rent as the reasonable rent to be "paid under a new tenancy, plainly this legislation, so far as it is "concerned with shop tenants, would be in a great measure defeated, "because the whole difficulty which has to be met is that, in con- "ditions of scarcity, the open market value may be forced up to a "point which exceeds all reason; and it is essential in order to make "legislation of this kind effective that the tribunal which is to fix the "rent should be able to discount contemporary open market values "to the extent necessary in its opinion to arrive at a fair result. .... "The judge came to that conclusion on the principle, with which I "entirely agree, as I have said that the court is not asked to ascertain "the open market rent in the face of scarcity and inflation, but is "required to form an opinion as to the reasonable rent,....and in "my view, it would be wholly wrong for this court to disturb his "decision."[1] In that case the original rent fixed in 1931 was £160, the market rent was held to be "£750 or more" and a reasonable discount for inflated rent due to shortage of shop property was held to be £200, i.e., about 27%. In making this discount one must not discount increase in general costs to the landlord or decrease in value of money. Again, in measuring this discount it must be borne in mind that a renewal of a tenancy under the Leasehold Property (Temporary Provisions) Act, 1951, cannot exceed a period of twelve months, whereas under our Business Tenancies Act the period can be as much as five years; one must be alert, therefore, to realise that a market rent for a new lease of five years would substantially exceed such a rent for a period of one year. In the present cases the evidence indicated that a dispossessed tenant might have considerable difficulty in finding premises inside a year, and, indeed, the period might be two years or more. In these circumstances it would not be surprising to find an element of inflation in rents in North Street (a good shopping area) due to scarcity of premises. Furthermore, for what it is worth, I was informed by Mr. Frazer that he estimated from the poor law valuations put on the respective premises that the assumed rents for the purpose of general revaluation were No. 38 £360 and No. 40A £317.

Mr. Nicholson on behalf of the respondents emphasised the differences between the English Act and the Northern Ireland Act

[1] [1952] 2 Q.B. at 277.

and, whilst recognising that the words "as the Court in all the cir- "cumstances thinks reasonable" [section 12(2) Leasehold Property (Temporary Provisions) Act, 1951] do not appear in the Northern Ireland Act, he properly admitted that the court here must act reasonably in fixing the rent; but, whilst he admitted that on the true construction of the Northern Ireland Act, it was open to the court to reduce the rent below the market value yet he argues that the court cannot do so "just as it thinks reasonable." "The door is "not as open as that," he says. He contended that in Northern Ireland the rent should only be reduced where the court finds it necessary to guard against a form of extortion, and that the court must be careful not to reduce the rent below the market value in order to be generous to the tenant. My opinion is that the decision in *John Kay Ltd. v. Kay*[1], and, in particular, the portions to which I have referred, afford guidance to a court in administering the Northern Ireland Act. Much is left to the good sense of the court in applying that guidance to particular cases, but the discount, if any, to be made on a market rent will depend largely on the element of inflation due to scarcity of premises. Before any discount is considered, no doubt an attempt will be made to adjust the market rent to the length of term which it is intended to grant. It is not possible to be precise in fixing rents under this Act, and, I repeat, the court must do its best with the available evidence. It may well be that in making its way towards ascertaining, amidst disputed figures and differing opinions of valuers, the market value of premises the court may think that its own figures make due allowance in favour of the tenant in respect of inflated rents, and in such case the court might consider it reasonable to make no discount, on the other hand the final market rent may in the opinion of the court require to be discounted. Such are matters for the court to decide in a reasonable way. The learned Recorder has fixed a term of five years in each application, and no case has been made out why it should be less. I think it is reasonable and I affirm his decision on this. He has found the market rent in the case of Joseph Brown, No. 38 North Street, to be £610, and in the case of Ulster Chemists Ltd. No. 40A North Street to be £575. These he reduced respectively to £580 and £545, being reductions of 5% approximately. I think these are reasonable in the circumstances and are justified on the evidence, and I decline to come to any different conclusion. In this regard evidence was given that reductions below market rents were given by some

[1] [1952] 2 Q.B. 258.

landlords to sitting tenants on renewal of leases, and Mr. McAllister put this reduction at 15% to 20% and said it was what a generous landlord might give; Mr. Frazer said that some landlords allow one-sixth reduction in the market rent, and Mr. Dalzell allows 10% reduction for a sitting tenant, but was of opinion that this was because of operation of the Business Tenancies Act and the possible operation of the Town Tenants Act. It seems to me that the court cannot apply any of the percentages mentioned merely because they may be percentages which some or most landlords allow to sitting tenants; the court must decide what is reasonable on the particular facts in each case giving due weight to the matter I have already mentioned earlier in this judgment.

Accordingly the result of my judgment is that the order made by the learned Recorder is affirmed and I award costs against the respondents.

*Order affirmed.*

Solicitor for the applicants: *L. I. G. Fox.*
Solicitors for the respondents: *Cleaver, Fulton & Rankin.*

J.P.

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to the plaintiff did not cause him to alter his position to his detriment, and therefore even if the plaintiff had returned with a proper deposit before the expiration of the hour he would not be entitled to the remedy sought. *Quaere*, whether in any circumstances the doctrine of equitable estoppel can be invoked where a promisee is seeking to enforce rights against the promisor. *Morrow v. Carty.* [Ch.D. 174

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CRIMINAL LAW—EVIDENCE—*Corroboration—Evidence of an accomplice.* The appellant had been convicted of receiving stolen goods. The principal witness for the prosecution was an accomplice who had pleaded guilty to stealing the goods. The accomplice had given evidence of the following facts: (i) that he had sold the stolen goods to the appellant at a certain price; (ii) that on several occasions he had, at the appellant's direction, signed receipt cards for the goods in the fictitious name in which the appellant had made out the cards; (iii) that when the thefts were discovered he had told the appellant, who thereupon stated that he would destroy the records of the transactions. It was submitted on behalf of the appellant that the corroborative evidence required was evidence relating to such parts of the accomplice's evidence as had been challenged by the defence and which remained a live issue between the Crown and the appellant, and that accordingly evidence which corroborated part of the evidence of the accomplice which was accepted by the defence was not such corroboration as is required by the rule relating to the corroboration of accomplices. *Held*, by the Court of Criminal Appeal (Lord MacDermott L.C.J., Curran L.J. and McVeigh J.), (i) that independent evidence that the price paid was that stated by the accomplice corroborated the evidence of the accomplice, and that such evidence was material insofar as it showed that the goods were purchased at undervalue; (ii) that the presence of fictitious names in the accused's handwriting on the receipt card could be corroborative evidence on which the jury might act, though it did not affirm that part of the accomplice's evidence that it was the accused who told him to sign in a fictitious name; (iii) that evidence that certain of the accused's records covering the relevant period had been destroyed could be corroboration of the accomplice's evidence on this matter; *Held*, further, that there is no authority for restricting the requisite corroboration to the part or parts of the accomplice's evidence which the accused has challenged. *Reg. v. Hodgett.* [C.C.A. 1

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the register; (ii) that the fact that one of the parties to an invalid charge would be damnified by its cancellation did not constitute "loss or damage to any "person" for the purposes of section 34(2) of the Act of 1891, as amended, so as to preclude the court from directing such cancellation; *In re Alice Trainor* [1936] N.I. 197 followed; (iii) that the mortgage by demise did constitute a "letting" for the purposes of section 30(1) of the Act of 1925, and was therefore void; (iv) that the deed executed by M. and the society was not effective to charge the lands otherwise than by way of demise; (v) and that accordingly the registration of the charge in favour of the society should be cancelled. *In re Local Registration of Title (Ireland) Act*, 1891, (*Moley's case*) [C.A. 130

MALICIOUS INJURY—*Cutting and larceny of telephone wires—Measure of compensation—Grand Jury (Ireland) Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 135—*Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 37—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict.*, *c.* 37), *s.* 5(1). The applicant claimed compensation for damage to a telephone system occasioned by the cutting and taking away of a quantity of wire. *Held*, that though the primary motive was the larceny of the wire, there had been malicious damage within the relevant legislation, but as the larceny was neither a natural and direct consequence of the malicious act nor part and parcel of the act of destruction the applicant was not entitled to compensation in respect of the full value of the stolen wire, but could recover only the difference between the cost of the new wire and the salvage value of the stolen wire plus the cost of connecting up the severed ends of wire which had not been stolen. *H.M. Postmaster-General v. Londonderry R.D.C.* [C.A. 77

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there was nothing in the context of the word in the present Act to indicate that it was intended to have a wider meaning. Per Curran L.J. The conveyance of cattle for the purposes of grazing and fattening would not be a conveyance of "articles required for the purposes of "agricultural land." *Porter v. Boomer.* [C.A. 122

PRACTICE—INTERROGATORIES—*Taxi-cab involved in collision—Claim for loss of trading profits—Defendants seeking details of tax paid by plaintiff in three years before accident—Whether damages recoverable subject to tax.* In an action in tort claiming loss of trading profits a defendant is not entitled to interrogate with regard to the income of the plaintiff and the tax paid thereon in previous years, as any damages recovered in respect of trading profits would themselves be liable to tax, and consequently the amount of tax payable should not be taken into account in arriving at the figure for damages. *Morahan v. Archer & Belfast Corporation.* [Q.B.D. 61

——REMITTAL MOTION—*Injuries not of serious nature.* In an action for damages for personal injuries the defendants moved to remit the action on the grounds, (i) that the plaintiff's injuries were not of a serious nature, (ii) that the defendants had a good defence in law and on the merits, and (iii) that the plaintiff had no visible means of paying costs. The plaintiff objected to the action being remitted on the grounds, (i) that the injuries, viz., severe nervous shock and anxiety neurosis, were sufficiently serious to justify the retention of the action in the High Court, and (ii) that substantial questions of fact and law were involved. *Held,* that as the evidence contained in the medical affidavits was not such as to support the plaintiff's contention that the injuries were of a serious nature, and that as any question of law which might arise could be determined on a case stated, the action should be remitted. *McComish v. Hillis* [Q.B.D. 68

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